(29,681)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 371.

JAMES C. DAVIS, AGENT, PETITIONER,

vs.

MRS. MARY KENNEDY, ADMINISTRATRIX OF THE ESTATE OF DAVE KENNEDY, DECEASED.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 3, 1923.

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[fols. 1-4] **IN CIRCUIT COURT OF DAVIDSON COUNTY**

Friday, October 15, 1920.

Mrs. Mary Kennedy

vs.

N., C. & St. L. Ry. et al.

Order Dismissing Suit as to L. & N. R. R. Co.

In this cause on motion of the plaintiff, the plaintiff takes a non suit as to the defendant Louisville and Nashville Railroad.

It is, therefore, ordered, by the Court that the suit be dismissed as to said defendant Louisville and Nashville Railroad Company and that said defendant recover of the plaintiff the costs of the cause incident to its being made a party defendant hereto, for which let execution issue.

O. K. W. E. Norvell, Jr., for Plaintiff. Ed. T. Seay, for Defendant.

[fol. 5] In Circuit Court of Davidson County

Wednesday, October 20, 1920.

[Title omitted]

Order Substituting John Barton Payne as Party Defendant

By consent, it is ordered that John Barton Payne, Agent, be and he hereby is, substituted as a party defendant, in accordance with the Transportation Act of February 1920, in lieu of the defendant Walker D. Hines Director General of Railroads.

M. T. Bryan, W. E. Norvell, Jr., Attys. for Plaintiff. Seth M. Walker, Atty. for Defendant.

[fol. 6] In Circuit Court of Davidson County

Thursday, October 21, 1920.

[Title omitted]

Order Transferring Cause to Second Circuit Court

This cause is hereby transferred to the Second Circuit Court there to be proceeded with as the law directs.

[fol. 7] IN CIRCUIT COURT OF DAVIDSON COUNTY

Thursday, October 21, 1920.

[Title omitted]

TRIAL OF CAUSE

Came the parties by their attorneys, also a jury of good and lawful men of Davidson County, to wit: E. C. Drake, T. H. Peak, G. P. Moore, R. E. Hitt, J. D. Peay, J. E. Burklin, J. H. Mayes, B. H. Baker, Ned Shelton, G. W. Carney, L. D. Ledbetter, and J. M. Peebles, who being duly sworn to well and truly try the issues joined and they having heard a part of the evidence, are respited from the further consideration of this cause until the meeting of the Court tomorrow morning.

[fol. 8] IN CIRCUIT COURT OF DAVIDSON COUNTY

Monday, October 25, 1920.

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDED DECLARATION

Upon motion of plaintiff, she is given permission to file an amended declaration adding thereby two counts to her original declaration.

To this order the defendant excepts.

This order is entered nunc pro tunc as of Friday, October 22, said order having been allowed at that time.

M. T. Bryan, W. E. Norvell, Jr. Seth M. Walker, Atty. for Deft.

[fol. 9] IN CIRCUIT COURT OF DAVIDSON COUNTY

Wednesday, October 27th, 1920.

[Title omitted]

JUDGMENT

Came the parties by their attorneys, also the jury who were on yesterday respited from the further consideration of this cause until the meeting of the court today, and they having heard the charge of the court, retired to consider of their verdict, returning into open Court the jury on their oaths do say they find the issues in favor of the plaintiff and by reason of the premises assess her damages at $8,000.00.

It is, therefore, considered that the plaintiff have and recover of the defendants, the sum of $8,000.00 also all the costs of this cause, for all of which let execution issue.

[fol. 10] IN CIRCUIT COURT OF DAVIDSON COUNTY

Saturday, November 20, 1920.

[Title omitted]

ORDER CONTINUING HEARING OF MOTION FOR NEW TRIAL AND GRANTING LEAVE TO AMEND SAME

Be it remembered that this cause was heard before the Hon. A. B. Neil, Judge upon application of defendants to continue the hearing of the motion for a new trial filed Nov. 15, 1920, until November 27th, 1920, and to amend said motion so as to add another ground thereto, which is the 35th ground, the Court upon consideration was pleased to allow, both motions to which action plaintiff excepted.

Said amendment will be made on the margin of said written motion.

[fol. 11] IN CIRCUIT COURT OF DAVIDSON COUNTY

Saturday, November 27, 1920.

[Title omitted]

ORDER CONTINUING HEARING

This cause came on to be heard upon motion of the defendant for a new trial and the court having heard the motion read and argument of counsel is pleased to take the same under advisement until a later day of the term.

[fol. 12] IN CIRCUIT COURT OF DAVIDSON COUNTY

Tuesday, December 7th, 1920.

[Title omitted]

This cause came on further to be heard as well as upon a former day of this term upon motion of the defendants for a new trial upon the following grounds, to wit:

[File endorsement omitted.]

MOTION FOR NEW TRIAL—Filed Nov. 15, 1920

The defendants, Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Federal Agent, for the United States Govern-

ment, move the Court that the verdict of the jury heretofore returned be set aside and a new trial granted, upon the following grounds, to wit:

I

Because the evidence preponderates against the verdict of the jury, and in favor of defendants' non-liability.

II

Because there is no evidence to support the verdict of the jury.

III

Because the Court erred in overruling defendants' motion for [fol. 13] peremptory instructions at the close of all the evidence, which motion is as follows:

"The defendants, John Barton Payne, Federal Agent, and the Nashville, Chattanooga & St. Louis Railway move the Court to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced in favor of the plaintiff is justified.

* * * The defendants move the Court to peremptorily instruct the jury to return a verdict in favor of both defendants on the ground that the evidence shows without a dispute that the primary and proximate and only negligence shown in the proof is that of the deceased."

4

Because the Court erred in overruling the motion for peremptory instructions made on behalf of the Nashville, Chattanooga & St. Louis Railway, for the reason that the undisputed proof shows the death of the deceased, D. C. Kennedy, and the accident which brought his death, for which this suit was brought, occurred at a time when the Nashville, Chattanooga & St. Louis Railway was not operating the trains and cars that caused the deceased's death, but the proof showed that said train was being operated by the United States Government, and therefore, under the Cummins-Esch Bill, no recovery could be had against said railway.

[fol. 14] 5

Because the verdict of the jury, under the law and the facts of the case, is excessive.

6

Because the verdict, under the law and facts, is so excessive as to show prejudice, passion and caprice on the part of the jury.

7

Because the court erred in permitting the plaintiff to amend her declaration by adding the Fourth and Fifth Counts thereto, and particularly, when so allowing said amendment, the Court erred in failing to sustain defendant's motion for a mistrial.

8

Because the Court erred in failing and refusing to permit the evidence of the witness James Fahey, to go to the jury and be considered by them as evidence in this case, which evidence is in the following words and figures, to wit:

"Q. Mr. Fahey, what position do you hold, with the N. C. & St. L. Ry.

A. Traveling engineer.

Q. Did you hold that position with the Government during Government control.

A. Yes sir.

Q. The whole time.

A. Yes sir.

Q. How long had you been in the N. C. & St. L. Ry. employ [fol. 15] before the Government control.

A. Well, about thirty years I guess.

Q. Then prior to this accident you were employed by the railway for about twenty eight years.

A. Yes sir, about.

Q. What are your duties as traveling engineer.

A. Well, I ride the locomotives to instruct the men in the operation of them, find the defects in a locomotive and have them corrected.

Q. Have you ever pulled train No. 4, the one Mr. Kennedy was pulling.

A. I have pulled Schedule No. 4, out of here, yes sir.

Q. Have you ever acted as engineer or traveling engineer in connection with Mr. Kennedy at the time he was pulling train No. 4.

A. Any number of times.

Q. If you know, state what was the custom and practice between engineers and conductors and particularly Mr. Kennedy with reference to the conductor and those on the rear part of the train relying upon the engineer to ascertain and identify the arrival of such a train as No. 1.

Mr. Norvell: We object to that on the ground, first it is a question of fact what happened between Eubanks, secondly the gentleman can't override these rules and duties by a custom that happens to [fol. 16] some other times. The rules state themselves. It must be a positive fact, and agreement, not as to some custom.

Mr. Walker: All the rules do is to establish a custom.

Objection sustained.

Out of the hearing of the jury the witness answered.

A. Well, it was my observation while riding this train with Mr. Kennedy, that the conductor relied more or less on him, in other words, on any number of times, I can't give the specific dates or days, I have stopped Mr. Kennedy at the shop because in riding the engine I didn't identify this No. 1, which was a superior train and for the information that it had arrived, whether or not the conductor got any information I can't say. He was never in evidence at any of these particular times.

Cross-examination waived.

Mr. Walker: May it please the Court he has answered in the absence of the jury, and I now offer that testimony and ask that it go to the jury.

Mr. Norvell: I want the Court to listen to the answer before he passed on that.

The jury here retired.

(Answer read to the Court.)

[fol. 17] Mr. Walker: The point I want to make is if the Court is wrong in excluding it, in order to get the court in error about it, I have got to offer it to go to the jury.

By the Court: I thought the testimony of Mr. Eubanks on that question was incompetent. He stated that he had previously had an agreement with Mr. Kennedy that Mr. Kennedy, would look out after No. 1, he so stated a number of times, but as I recall, Mr. Eubanks did not state that he had that agreement that morning, but I allowed that — go to the jury believing it to be competent that the jury might possibly have a right to infer that they had such a general understanding that it would be observed on the morning of the accident whether they had an express understanding that morning or not.

Now the testimony of this witness is excluded because it, undertakes to establish a custom which would have a tendency to destroy the effect of the rules of the company, that relieve an employe of the railroad from his duty imposed upon him by the rules of the company and the company don't escape liability in that fashion as I see it.

Mr. Norvell: To further more complete the record from my standponit I was to further object to the answer, that the answer is entirely incompetent because in addition urged to the question all [fol. 18] this answer says from what he says it looked like or the fact was, that the parties in the rear more or less *relief* on the conductor, and getting down to the plain facts, all he states *in* that on occasions when he had ridden and stopped the train at the shops he didn't notice the conductor came forward.

By the Court: That is true, he has moved to let go before the jury and I have overruled the motion and he has excepted."

Because the Court erred in failing and refusing to permit the evidence of the witness Sam Bomar to go to the jury and be con-

sidered by them as evidence in this case, which evidence, is in the following words and figures, towit:

Q. Mr. Bomar, you are a conductor on the N. C. & St. L. Ry., are you.

A. Yes sir.

Q. You now are conductor on train No. 4.

A. No. 4 and 5.

Q. Train No. 4, leaves Nashville at 7 o'clock and is the same train as that which left on the morning of July 9th, 1918, from Nashville to Hickman, Kentucky, is it.

A. Yes, sir.

Q. Now, prior to July 1918, as conductor while you were on train No. 4, and a similar train what was the custom and practice between [fol. 19] you and other conductors between the engineers, pulling such trains as No. 4, and particularly Mr. Kennedy, with reference as to whether or not between the Uinon Station and shops whether the conductors and yourself rely upon engineers to ascertain and identify the arrival of No. 1.

A. I don't know what the other conductors were but mine was to rely on the engineer to identify the train with the number of the engine it had.

Mr. Norvell: I object to that as above, and also on the further ground that what he relied on has nothing to do with Eubanks and Kennedy.

Objection sustained, defendants excepted.

Cross-examination.

By Mr. Norvell:

Q. You run with Kennedy before the accident.

A. Yes, sir.

By the Court: That is a close question gentlemen, but I really don't think it is competent.

10th. Because the Court erred in failing and refusing to permit the evidence of the witness J. T. Riggle to go to the jury and be considered by them as evidence in this case, which evidence is in the following words and figures, towit:

[fol. 20] Q. Mr. Riggle, you are now in the employ of the N. C. & St. L. Ry. are you.

A. Yes, sir.

Q. You have been for how many years.

A. I was with the N. C. & St. L. Thirty eight and a half in train service.

Q. How long have you been a conductor.

A. Somewhere between fifteen and eighteen years.

Q. State whether or not previous to July 9th, 1918, and at and about that time, whether or not you were conductor on a train such

as No. 4, that pulled out from the Union Station on the morning of July 9, 1918.

A. Yes, sir.

Q. I want you to state to the Court what was the practice with reference to that of the conductors relying upon the engineers to identify the arrival of train No. 1, at that time, particularly the engine number between the Union Station and shops.

A. As a practice so far as I know, we relied upon the engineer, as a rule we began checking as a rule leaving the Union Station.

Q. Mr. Kennedy had pulled you I believe.

A. Yes sir, I had railroaded with him several years.

Q. That practice was applicable to him as well as to other engineers.

A. Yes, sir.

Same objection and same ruling.

[fol. 21] Mr. Walker: We offer this testimony and ask the Court to permit it to go to the jury, the testimony of Mr. Riggle and that of Mr. Bomar the witness who has just preceded him.

11. Because the Court erred in charging the jury as follows:

"If any witness has become involved in material contradictions on cross examination or has otherwise behaved in such manner as to make you doubt his testimony then just what to do with the testimony of such witness or any part of it, is strictly a matter which the law leaves to the sound discretion of the jury who may accept or reject any part, or all of such testimony according to the degree of its credibility.

This was error for the reason that this instruction left it to the jury in its discretion to arbitrarily accept or reject any part of a witness' testimony, though corroborated by other competent and credible evidence, if such witness had become involved in material contradictions.

12. Because the court erred in charging the jury as follows:

"It is the duty of the court to instruct the jury as to the law of this case, and it is your exclusive duty to weigh the evidence and to find the facts. It is for you to judge of the credibility of the witness and to reconcile all conflicts and discrepancies, if any, in [fol. 22] their testimony upon the supposition that all of them have spoken the truth if you can do so, but if you can not do this, then it is your duty to believe that evidence which you think more worthy of credit and to ignore such evidence as you can not believe."

13. Because the Court erred in charging the jury as follows:

Now gentlemen of the jury, if you should find from a preponderance of all the evidence in the case that on July 9th, 1918, the deceased, David Kennedy, was in the employ of the N. C. & St. L. Ry.,

Walker D. Hines, Director General of railroads, John Bartin Payne, Agent, etc., as a railroad, engineer, that on said date, about 7 o'clock A. M. he was in his proper place in the performance of his duties, operating an engine on train No. 4, of defendants' line, of road from Nashville, and that said train was engaged in commerce between points in Tennessee and Kentucky, that on said day, he was killed while thus engaged, his train colliding with another train, running in an opposite direction the plaintiff as administratrix of his estate would have the right to recover a verdict at your hands provided you should find from a preponderance of all the evidence in the case that the collision of trains in which her said intestate lost his life was the result of the negligence in whole or in part of the fireman in failing to look and observe approaching train No. 1 and to notify deceased that said train a superior train had not passed or that it was, in whole or in part the result of or caused by the con- [fol. 23] ductor's negligence in not watching for train No. 1, and in not warning deceased to stop at shops to let said train pass or that it was in whole or in part caused by the negligence of the operator at Shops in allowing train No. 4, to pass on the main track at shops when train No. 1, had not passed that point, or that it was in whole or in part caused by the negligence of the flagman in failing to assist the conductor in watching for the passing train, No. 1, and in failing to warn the conductor that No. 1 had not passed so as to enable the conductor to stop train No. 4, at shops and let No. 1, pass at said point or that said collision causing the death of her intestate was in whole or in part, caused by the negligence of said flagman in not watching the rear end of train No. 4, thereby protecting same, and in not being at or near the said rear end after passing shops, and in failing, thereby to hear the signal given by the operator at shops, or that said collision was due in whole or in part to the negligence of the defendants in employing an inexperienced flagman on train No. 4, on July 9th, 1918, and that because of his inexperience and inability to understand his duties he failed to assist the conductor by watching for train No. 1, and in not notifying said conductor that train No. 1, had not passed, so that he could have the train stopped before coming in contact with train No. 1."

The Court committed error in charging the jury that if they should find from the evidence that the deceased lost his life because [fol. 24] of the negligence in whole or in part of the fireman in failing to look out and observe approaching train No. 1, and in failing to notify deceased that said, superior train had not passed for the reason that there was no evidence upon which to submit this question to the jury, and because that portion of the excerpt set out in this ground for a new trial fails to mention the fact that said negligence must have been the *approximate* cause in whole or in part of deceased- death.

The Court committed error, further in charging the jury that if they found from the evidence that the deceased's death was caused in whole or in part, by the negligence of the operator at the shops

in allowing train No. 4, to pass, on to the main track at shops when train No. 1, had not passed, that point, for the reason that there was no proof, offered upon which the question of negligence of the operator could properly be submitted to the jury and because that part of said instructions fails to tell the jury that in the event the operator was guilty of negligence, before recovery could be had, such negligence must have been the proximate cause of deceased's death.

14. Because the Court erred in charging the jury as follows:

"Before the plaintiff can recover, it must be shown by a preponderance of all the evidence that some one, or all, of the above [fol. 25] acts of alleged negligence was, in whole, or in part, the cause of the injury and death of plaintiff's intestate, David Kennedy."

This instruction was error for the reason that it fails to tell the jury that before plaintiff could recover, that any one or all of said alleged acts of negligence must have been the proximate cause of deceased's death.

15

Because the Court erred in charging the jury as follows:

"But if you should find for the plaintiff, you should go further and assess the damages. In doing this, you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have diminished by reason of advancing years. The jury may further consider the care, attention, advice and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children and make such pecuniary allowance therefor as in your opinion is warranted by the evidence."

16

Because the Court erred after giving defendant's request No. 1 by inserting therein the words "in order to diminish recovery" so that said request reads as follows:

"I charge you that the burden of proof is upon the defendants to [fol. 26] show that the deceased was guilty of contributory negligence (in order to diminish the recovery) but that if the weight of preponderance of the evidence, whether coming from plaintiff's or defendants' witness, shows the deceased to have been guilty of such contributory negligence, the defendants have thus carried the burden of proof".

17

Because the Court erred after giving defendants' request No. 7, by adding thereto the following:

"But if you should find that in the past there had simply been a specific agreement that Kennedy should not expect Eubanks to look out for No. 1, on those particular days, and that there was no uniform custom or agreement as to all times, or on this morning, July 9, 1918, and that Kennedy did not believe nor have cause to believe, that Eubanks, would not look out for No. 1, on this particular morning, then Kennedy did have the right to believe, that Eubanks, would look out for No. 1, on the morning of the accident."

18

Because the Court erred, after giving defendants' request No. 8, by adding thereto the following:

"Before the plaintiff can recover on the ground that the conductor, J. P. Eubanks violated *to* Railroad Company Rule No. 83, [fol. 27] or any other rule, it must be made to appear that such violation in whole or in part caused the accident and consequently injury and death of deceased."

This additional wording to said special request was errors for the reason that the same fails to tell the jury that such violation of a rule must have amounted to negligence, which in whole or in part, was the proximate cause of deceased's death, before the defendants would be liable.

19

Because the Court erred in failing and refusing to give defendants' request No. 1, which is in the following words and figures, towit:

"I charge that before you can find the defendants liable for any amount that the plaintiff must show by a preponderence of the evidence that the defendants were guilty of some act of negligence alleged in the declaration which in whole or in part was the proximate cause of her intestate's death."

20

Because the Court erred in failing and refusing to charge the jury defendants request No. 2, which is in the following words and figures, towit:

"If you find from the evidence that the defendants were guilty of some act of negligence alleged in the declaration, but that such act [fol. 28] was not the proximate cause of plaintiff's intestate's death, I charge you that plaintiff can not recover and your verdict must be for the defendants.

21

Because the Court erred in failing and refusing to charge the jury defendants' request No. 5, which is in the following words and figures, towit:

"I charge you that if you find from the evidence that defendants agents, were guilty of some act of negligence, alleged in the declaration, which in whole or in part, was the proximate cause of plaintiff's intestate's death, then and in that event defendants would be liable to the plaintiff for some amount, but I further charge you that the undisputed proof shows deceased to have been guilty of contributory negligence, so that if you find the defendants liable, under the instructions hereinbefore given you must reduce the amount which plaintiff might be entitled to in the absence of contributory negligence as the proof in, your judgment shows him to have been guilty of."

22

Because the Court erred in failing and refusing to charge the jury defendants' request No. 9, which is in the following words and figures, towit:

"If you find from the evidence that plaintiff's intestate, D. C. [fol. 29] Kennedy, for whose death this suit is brought, could by the exercise of ordinary care, have prevented the accident, which resulted in his death, then I charge you that the plaintiff, in this case, can not recover, and, your verdict must be for the defendants.

23

Because the court erred in failing and refusing to charge the jury defendants' special request, No. 10, which is in the following words and figures, towit:

"If you find from the evidence that conductor Eubanks was negligent in failing to signal engineer Kennedy, to stop the train after it had passed on to the single track, and you further find that engineer Kennedy had no reason to believe that conductor Eubanks would so signal him either because Eubanks had told him he would not or because it was not the custom of the conductor to watch for the passage of train No. 1, and engineer Kennedy knew it was not, then I charge you that engineer Kennedy assumed the risk of such of such failure on the part of conductor Eubanks to so, signal and on this branch of the case you will find in favor of the defendant Railway."

24

Because the Court erred in failing and refusing to charge the jury defendants' request No. 11, which is in the following words and figures, towit:

"The employes assume the risk of such negligence of his fellow [fol. 30] employes as is shown to him or as custom has shown to him to be the habit of the fellow employes *as is shown to him or as custom has shown to him to be the habit of the fellow employes.*

If you find from the evidence that it was a custom known to Kennedy that his conductor, would be taking tickets while he was passing, from the Union Station to the New Shops, and would not be looking out for the passage of No. 1, then he assumed the risk of conductor Eubanks' failure to do so and he cannot recover on account of such negligence.

25

Because the Court erred in failing and refusing to, charge the jury defendants request No. 12, which is in the following words and figures towit:

"Certain rules promulgated by the railway have been introduced in this case, to the effect that it was the duty of conductor Eubanks to keep a lookout for No. 1, between the Union Station and the New Shops the Court charges you that, such rules were not made for the protection of engineers as Kennedy, in this and no right can accrue to such engineer by reason of the failure of the conductor to observe them. It was the duty of engineer Kennedy to observe said rules, and if he failed to do so and such failure caused the accident in which he lost his life, the fact that the engineer failed to prevent [fol. 31] the accident does not entitle plaintiff to recover in this case."

26

Because the Court erred in failing and refusing to charge the jury defendants' request No. 13, which is in the following words and figures, to wit:

It is insisted by the plaintiff that the failure of conductor Eubanks, to stop the train for the passage of No. 1 was negligence entitling plaintiff to recover, but I charge you, gentlemen of the jury, that no such duty devolved upon him as to engineer Kennedy until he became actually aware that the train had not passed No. 1, and that Kennedy was not going to stop and if you find that conductor Eubanks did not actually know that his train had not passed No. 1, the plaintiff can not recover on account of such failure of conductor Eubanks.

27

Because the Court erred in failing and refusing to charge the jury defendants' request No. 14, which is in the following words and figures, to wit:

"The Court charges you that the degree of care to be observed in the running of trains is not to be determined by the rules of the railway and you cannot determinate in this case the duty of the fellow servants of engineer Kennedy by what is contained in the rules presented in this case. The question presented for your consideration is whether from the facts in this case Mr. Kennedy came [fol. 32] to his death by reason of his own faulrs or negligence. If

you find that Mr. Kennedy solely by reason of his own fault came to his death in this accident, then he cannot recover. The only manner in which you must consider the rules is as to whether engineer Kennedy had a right under such rules to rely upon conductor Eubanks stopping the train in case he failed to do so. If you find that Kennedy knew that Eubanks would be engaged in taking up tickets or for other reason- might not, observe the passage of No. 1, then the defendant would not be liable for the failure of Eubanks to see the passage of No. 1 and signal Kennedy to stop."

28

Because the Court erred in failing and refusing to charge the jury defendants' request No. 15, which is in the following words and figures, to wit:

"Gentlemen of the jury, the Court charges you that under the law and admitted facts of this case, the paramount duty of looking out for No. 1, was on the engineer and if you find that the order was delivered to him by the conductor and an understanding was had between them in substance and effect that, the conductor would be busy taking tickets, and look out for No. 1, but would expect the engineer to keep the lookout, then I charge you that the engineer [fol. 33] assumed the duty of keeping a lookout and if you find that he failed to do so, then you will find for defendant.

29

Because the Court erred in failing and refusing to charge the jury defendants' request No. 16, which is in the following words and figures, to wit:

"If you find that the other members of the crew had other duties to perform during running of the train between Union Station and shops, which might prevent them from obser-in*v* *g*he passing of No. 1, and you find from the e*i*vdence that the engineer knew this, then plaintiff cannot recover and your verdict should be for the defendant.

30

Because the Court erred in failing and refusing to charge the jury defendants' request No. 17, which is in the following words and figures, to wit:

"If you believe from the evidence that the plaintiff's intestate D. C. Kennedy, was negligent in the handling and operation of train No. 4, of which he was the engineer and if you further believe from the evidence that such negligence continued up to the time of the accident and that the accident would not have occurred if he had not been so negligent, then I charge you that the plaintiff cannot recover and your verdict must be for the defendant, even though you [fol. 34] find from the evidence that the conductor of the train, Jas. P. Eubanks, was also guilty of negligence."

31

Because the Court erred in failing and refusing to charge the jury defendants' request No. 18, which is in the following words and figures, to wit:

"If you believe from the evidence that the accident resulting in D. C. Kennedy's death would not have occurred unless both Eubanks, the conductor, and Kennedy the engineer, were continuously negligent up to the time of the accident, there can be no recovery in this case, and your verdict must be for the defendant."

32

Because the Court erred in failing and refusing to charge the jury defendants' request No. 19, which is in the following words and figures, to wit:

"If you believe from the evidence that D. C. Kennedy for whose death this suit is brought, deliberately and understandingly undertook to assume Eubanks' duty to watch out for train No. 1, between the Union Station at Nashville, and the Shops as provided by Rule 83, then I charge you that the plaintiff in this case is estopped to rely as a basis for recovery upon the fact that Eubanks did so violate said rule."

—

Because the Court erred in failing and refusing to charge the jury [fol. 35] defendants' request No. 20, which is in the following words and figures, to wit:

"If you believe from the evidence that engineer D. C. Kennedy, deliberately and understandingly agreed with conductor Eubanks that said conductor need not comply with said rule of the railroad, No. 83, as applicable to the movement between the Union Station at Nashville and the Shops at Nashville, then I charge you that if you find from the evidence that conductor Eubanks did violate said rule, yet the plaintiff on account of said agreement, cannot rely thereon as a basis for recovery in this case."

34

Because the Court erred in failing and refusing to charge the jury defendants' request No. 21, which is in the following words and figures, to wit:

"If you find from the evidence that engineer D. C. Kennedy knew that conductor Eubanks on the date in question did not intend to find out by his own act whether train No. 4 passed train No. 1, between the Union Station at Nashville and the Shops at Nashville, and if you further find that said engineer Kennedy, with said knowledge, made no complaint nor protest, then I charge you that the

plaintiff cannot rely as a basis for recovery upon the fact, if you find from the evidence that it is a fact, that Eubanks did not intend to and did not watch out for said train No. 1, as aforesaid.

[fol. 36] 35

Because the plaintiff, Mary Kennedy, since the jury returned its verdict, in this cause, to wit, on the — day of November 1920, received certain injuries in an automobile accident which are permanent in their nature and which materially decreased her expectancy of life, all of which will be fully shown in detail on the hearing of this motion for a new trial.

Upon argument of counsel and due consideration whereof the Court is pleased to overrule said motion, to which action of the Court the defendants except and pray an appeal in the nature of a writ of error to the next term of Court of Civil Appeals, sitting at Nashville, Tennessee, which is by the Court granted, upon the defendant executing an appeal bond as required by law.

The defendants are allowed twenty days from this date within which to file appeal bond also bill of exceptions and otherwise prepare and perfect their appeal.

[fol. 37] [File endorsement omitted]

IN CIRCUIT COURT OF DAVIDSON COUNTY

[Title omitted]

DECLARATION—Filed May 3, 1920

First Count

The plaintiff, Mary Kennedy, as Administratrix of the estate of D. C. Kennedy, deceased, sues the defendants The Nashville, Chattanooga & St. Louis Railroad Company, a corporation chartered and doing business under the laws of the State of Tennessee, with its principal office in Nashville, Tennessee, and operating a line of railroad extending through Nashville, Davidson County, Tennessee, in one direction to St. Louis, Mo., which is, and at all times hereinafter mentioned was, a common carrier engaged in Interstate Commerce and engaging employees in connection therewith within the true intent and meaning of the Federal Statutes and Acts of Congress governing, regulating and protecting such employees, as well as under other conditions; and the defendant, Walker D. Hines, Director General of Railroads of the United States, who as such Director General was before and at the time of committing the grievances hereinafter mentioned, in connection with the defendant, operating said corporate defendant as a common carrier of

[fol. 38] passengers and freight for hire and reward, in and by certain trains or railway cars from and between the points above mentioned and all equipment in connection therewith. The plaintiff sues for $25,000.00 as damages and for cause of action states:

That on or about the 9th day of July, 1918, the said D. C. Kennedy, was in the employe of the defendants, acting in the capacity of engineer on a passenger train, engaged in interstate commerce, routed through Nashville, Shops and Harding, stations in Davidson County, Tennessee, to points north and west of Nashville.

On the morning of said day, plaintiff's intestate assumed his usual duties at Nashville and in the capacity of engineman was proceeding with said train from Nashville in a westerly direction along the route which included the stations of Shops and Harding. He was in his proper place, in the cab on the right hand side of the engine, discharging his duties. At a point between Harding and Shops in Davidson County, Tennessee, a collision occurred between the train occupied by plaintiff's intestate and No. 1, a train proceeding in an opposite direction with Nashville as it destination. That said collision was not due to any negligence or carelessness on part of plaintiff's intestate but was due to the negligence and carelessness of other employees of defendants, especially that of the fireman of the engine driven by intestate. Plaintiff's intestate's train was required to wait [fol. 39] at Shops and give No. 1, the right of way if it had not already passed No. 1, but before intestate reached Shops a blind train passed intestate's train on the left and intestate supposed that it was said superior train. Said train passed on the side of the fireman who was riding with intestate but said fireman did not notify, as he should have done, intestate that it was another train. Plaintiff's intestate was in his proper place, in the right hand cab, and could not see the approaching train which collided with intestate's train because of a long and dangerous curve on which the accident occurred; said curve extended to the left of intestate. It was the custom and duty of the fireman to be on the lookout when the enginemen could not see on opposite track and observe and report the passing of superior trains and the negligence and carelessness of intestate's fireman, an employee of defendants' in not looking ahead and warning intestate that No. 1, had not passed caused the accident and intestate was killed and suffered great physical pain and mental anguish before he died, in all of which plaintiff's intestate was free from fault or negligence and his said death was due to the negligence acts and omissions of defendants as above set forth.

The plaintiff further states that she is the administratrix of the estate of the said D. C. Kennedy, deceased, duly appointed by the [fol. 40] County Court of Davidson County, Tennessee, and her letters of administration are here to the Court shown; the said D. C. Kennedy was a married man, and left surviving him his widow, Mary Kennedy, and children, Anna May, Katie Bell and John George Kennedy, all dependent on him, as his next of kind, for whose use and benefit this suit is brought."

Defendants, though liable, refuse to pay, wherefore plaintiff sues as aforesaid and demands a jury to try this cause.

Second Count

The plaintiff, for her second count, adopts and makes a part hereof, the first and second paragraphs of her first count, as fully as though set forth verbatim herein, and in addition thereto alleges and shows that on the morning of said day plaintiff's intestate assumed his usual duties at Nashville and in the capacity of engineman was proceeding with said train from Nashville, in a westerly direction, along the route which included the stations of Shops and Harding. He was in his proper place, in the cab on the right hand side of the engine, discharging his duties. At a point between Shops and Harding in Davidson County, Tennessee, a collision occurred between the train occupied by plaintiff's intestate and No. 1, a train proceeding in an opposite direction with Nashville as its destination. [fol. 41] The management and control of intestate's train was vested in the conductor, an employee of defendants, of said train equally as much, if not more, than it was in intestate. In fact, it was the custom of intestate, as well as engineers acting in a similar capacity, to rely on signals from said conductor when to stop and start said train. Intestate and the conductor were required to wait at Shops and give No. 1, the right of way but before intestate reached Shops a train passed intestate's train on the left and as intestate did not receive any signal from the conductor to stop at Shops, intestate supposed it was the train that he was supposed to let pass it *at* before Shops that had passed him. The said conductor negligently failed to observe that said passing train was not No. 1, and carelessly and negligently failed to give a stopping signal and allowed intestate to proceed. That by reason of said negligence and carelessness on the part of said conductor, and without fault on the part of intestate, the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died.

The plaintiff, for the remainder of her second count, adopts and makes a part hereof, the last two paragraphs of her first count as fully as though set forth verbatim herein.

Third Count

[fol. 42] The plaintiff, for her third count, adopts and makes a part hereof, the first and second paragraphs of her first count as fully as though set forth verbatim herein, and in addition thereto, alleges and shows that on the morning of said day plaintiff's intestate assumed his usual duties at Nashville and in the capacity of engineman was proceeding with said train from Nashville in a westerly direction, along the route which included the stations of Shops and Harding. He was in his proper place, in the cab on the right hand side of the engine, discharging his duties. At a point between Shops and Harding in Davidson County, Tennessee, a collision occurred between the train occupied by intestate and a train proceeding in an

opposite direction, with Nashville as its destination. That said collision was not due to any negligence on the part of plaintiff's intestate but was due to the negligence and carelessness of other employees of defendants, particularly the operator at Shops who had charge of signaling trains at that point and who failed to signal intestate's train to stop. Plaintiff's intestate was on the right hand side of the engine and another train or "blind" had passed intestate's train on the left, intestate thinking that it was the train he was supposed to let pass at or before Shops. The operator at Shops negligently and carelessly failed to give intestate — to proceed and threw the switch or [fol. 43] allowed it to remain open. That by reason of such negligence on the part of said operator the collision occurred, killing intestate and causing him to suffer great physical pain and mental anguish before he died.

The plaintiff for the remainder of this count, adopts and makes a part hereof, the last two paragraphs, of her first count as fully as though set forth verbatim herein.

M. T. Bryan, W. E. Norvell, Jr., Attys. for Plaintiff.

[fol. 44] [File endorsement omitted]

IN CIRCUIT COURT OF DAVIDSON COUNTY

[Title omitted]

AMENDED DECLARATION—Filed Oct. 25, 1920

By leave of the Court first had and obtained, the plaintiff files this amendment to her original declaration and avers and alleges, in addition thereto, the following:

Fourth Count

The plaintiff, for her fourth count, adopts and makes a part hereof, the first and second paragraphs of the first count of her original declaration as fully as though set forth verbatim herein, and in addition and in addition thereto, alleges and shows that on the morning of said day, plaintiff's intestate assumed his usual duties at Nashville, and in the capacity of engineman was proceeding with said train from Nashville, in a westerly direction, along the route which included the stations of Shops and Harding. At a point between Shops and Harding in Davidson County, Tennessee, a collision occurred between the train occupied by plaintiff's intestate and No. 1, a train proceeding in an opposite direction with Nashville as its [fol. 45] destination. The management and control of intestate's train was vested in the conductor, an employee of defendants. On the morning in question. intestate's train was badly crowded with passengers, many of them local, as it had been on many occasions prior thereto owing to a deficiency of equipment. That to take up

tickets of local passengers to nearby points, the conductor had to proceed to collect said tickets promptly upon leaving the Union Station at Nashville and in going through the crowded train in so doing it was difficult for him to observe exactly what trains were passing, which facts were well known to the defendants.

That No. 1 was a superior train and the conductor should have required intestate's train to wait at the Shops until No. 1 passed; but this he did not do, thinking that a train or engine that had passed before this train got to the Shops was No. 1, the conductor at the time being engaged in taking up tickets and being in a crowded coach, where he did not see distinctly. That the flagman knew, or should have known, that No. 4 should not have gone on to the single track beyond the Shops until it was definitely ascertained that No. 1 had passed. That the said flagman had been furnished by the conductor with his copy of the train order giving the number of the engine pulling No. 1, That it was the flagman's duty to read train orders, keep them in [fol. 46] mind and to remind the conductor, should there be occasion so to do, and there was particularly such an occasion on the morning in question when the conductor was busy in a crowded coach, as the flagman well knew. That in utter disregard of his duty, the flagman on No. 4, knowing, or having cause to know, that No. 1 had not passed, failed to remind the conductor of that fact and by reason of said negligence and carelessness on the part of said flagman, the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died.

It was also the duty of the flagman to be on and protect the rear of the train. As No. 4, passed the Shop Town, the operator then endeavored to signal and stop No. 4, the flagman was not on the rear of the train. Had he been there in his place of duty, the train could have been stopped by the flagman's observing said signal and because of this negligence of the flagman the accident was not averted, but did occur and intestate was killed because thereof, etc."

The plaintiff, for the remainder of her fourth count, adopts and makes a part hereof, the last two paragraphs of the first count of her original declaration as fully as though set forth verbatim herein.

Fifth Count

[fol. 47] The plaintiff, for her fifth count, adopts and makes a part hereof, the first and second paragraphs of the first count of her original declaration as fully as though set forth verbatim herein, and in addition thereto, alleges and shows that on the morning of said day plaintiff's intestate assumed his usual duties, at Nashville and in the capacity of engineman was proceeding with said train from Nashville in a westerly direction, along the route which included the stations of Shops and Harding. At a point between Shops and Harding.

[fol. 48] [File endorsement omitted]

IN THE CIRCUIT COURT OF DAVIDSON COUNTY

[Title omitted]

PLEA OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY—Filed May 20, 1920

Plea of the Nashville, Chattanooga and St. Louis Railway

Comes the defendant, the Nashville, Chattanooga & St. Louis Railway, by its attorney, and defends the wrong and injury, when, etc., and says it is not guilty of the said supposed grievances in plaintiff's declaration laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath in her declaration thereof complained against it. And of this the said defendant puts itself upon the country, etc.

Seth M. Walker, Atty. for N., C. & St. L. Ry.

[fol. 49] [File endorsement omitted]

IN THE CIRCUIT COURT OF DAVIDSON COUNTY

[Title omitted]

PLEA OF DIRECTOR GENERAL OF RAILROADS—Filed May 20, 1920

Comes the defendant, Walker D. Hines, Director General of Railroads of the United States of America, by his attorney, and defends the wrong and injury, when, etc., and says he is not guilty of the said supposed grievances in plaintiff's declaration laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath in her declaration thereof complained against him. And of this the said defendant puts himself upon the country, etc.

Seth M. Walker, Atty. for Director General of Railroads.

[fol. 50] [File endorsement omitted]

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE

[Title omitted]

BILL OF EXCEPTIONS—Filed Dec. 11, 1920

Before Hon. A. B. Neil, Judge, and a Jury October 21, 1920.

For Plaintiff: Messrs. M. T. Bryan and W. E. Norvell, Jr.
For Defendant: Mr. Seth M. Walker.

Bill of Exceptions

On the trial of this case, the plaintiff, introduced the following evidence.
Witness for Plaintiff:

Mrs. MARY KENNEDY, called to the witness stand on behalf of the plaintiff.

Mr. Norvell: May it please the Court, this witness is stone deaf, and I want one of the daughters to act as interpreter you might say. Therefore, on account of her disability I am going to be very brief.
The Court: With Mr. Walker's consent.
[fol. 51] Mr. Walker: Yes, sir, maybe we can agree about this.
(Counsel confer.)
Mr. Norvel: May it please the Court, in order to save time in the examination of this witness by this character of examination, we have agreed that it may be stipulated that this witness may testify as follows on just a few *d*acts that I think I will have to prove by her. These are as follows:

That she is the widow of the deceased, D. C. Kennedy, that she qualified as administratrix of his estate in the County Court of Davidson County, Tennessee, and she files as exhibit one to her testimony a certified copy of her letters of administration:

EXHIBIT NO. 1 TO TESTIMONY OF MRS. MARY KENNEDY

Letters of Administration

Identified and Made Part of Record in This Cause Dec. 11, 1920.
A. B. Neil, Judge. (Seal.)

[fol. 52] STATE OF TENNESSEE,
County of Davidson:

To Mrs. Mary Kennedy, a citizen of Davidson County:

It appearing to the County Court, now in session, that D. C. Kennedy has died, leaving no will, and the Court being satisfied as to

your claim to the Administration, and you having given bond and qualified as directed by law, and the Court having ordered that Letters of Administration be issued to you:

These are therefore to authorize and empower you to take into your possession and control all the goods, chattels, claims and papers of the said estate, and return a true and perfect inventory thereof to our next County Court; to collect and pay all debts, and to do and transact all the duties in relation to said estate which lawfully devolve on you as Administrator, and after having settled up said estate, to deliver the residue thereof to those who are by law entitled.

Witness: Romans Hailey, Clerk of said Court at office, this 1st day of July 1919.

Romans Hailey, Clerk. W. E. Chadwell, D. C.

Filed, Dec. 11, 1920. W. B. Cook, Clerk, by Robert S. Webb, Deputy.

[fol. 53] Issued July 1, 1919. W. E. Chadwell, Deputy Clerk. A. B. Neil, Judge.

that she and the deceased were the mother and father respectively of the other three beneficiary plaintiffs named in the declaration; that her husband, D. C. Kennedy, at the time of his death was in the employ of the Nashville, Chattanooga and St. Louis Road, or the other defendant who was operating same at that time, as the case may be, employed by the Railroad administration, and running on that road; that he had been working on this road in the employ of the N. & C. or of its successor, the other defendant, for approximately forty-seven years, during that time working in one capacity or another, finally as engineer, for some years; that her husband, D. C. Kennedy, at the time of his death was seventy-two years of age; that he was vigorous and in good health and hale and hearty for that age; that at the time of her husband's death, she was fifty-six years of age, now being fifty-eight; that her condition of health since the time of the accident has been that she was nervously depressed and run down, but that she has improved, and her general health is fair, that is that there are no vital troubles that she knows of.

[fol. 54] Of course as to the home life there are some other matters and other details, and I will proceed.

Mr. Walker: It is agreed that she would testify to that.

Mr. Norvell: Yes, sir. Further, it is agreed, may it please the Court, that this witness would testify that up to the time of the accident the deceased provided for herself and family, and was up to that time the sole support of herself and the two young ladies named as beneficiary plaintiffs.

There is a matter as to the young man, but I did not want to put into her mouth something there might be a dispute about, and I will prove that by other witnesses.

Further Deponent saith not.

[fol. 55] The Court: The statement made by counsel, gentlemen of the jury, will be considered as a part of the record as the evidence of Mrs. Kennedy *is* she had been able to testify. She is very deaf and the counsel stipulated that this might be considered by the jury as her testimony.

Miss KATIE BELL KENNEDY, next witness, called in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. W. E. Norvell, Jr.:

Q. What is your name?
A. Katie Bell Kennedy.
Q. Miss Katie Bell, how old was your father when this wreck happened?
A. Seventy-two.
Q. Your mother of course was living then and is now; were you two young ladies living with the family at that time?
A. Yes sir.
Q. That was yourself and your sister, Miss Annie.
A. Yes sir.
Q. How old were you at the time of the wreck?
A. Twenty-one.
Q. How old was your sister?
A. Twenty-three.
[fol. 56] Q. Now prior to that time had you young ladies or either of you worked in any gainful occupation?
A. No.
Q. Your mother had no occupation except such as is done in the household there?
A. No sir.
Q. Who was the other member of the family?
A. John George.
Q. That is your brother?
A. Yes sir.
Q. How old was he at the time of the wreck?
A. He was seventeen.
Q. Where is he now?
A. He is in Clev-land, Ohio.
Q. This wreck was on July 9, 1918?
A. Yes.
Q. What was John George doing at the time?

Mr. Walker: We except to that as immaterial.
Mr. Norvell: Well, I think it is material to show who the members of the family were?
The Court: I hardly think so.
Mr. Norvell: Will your Honor hear me just a moment?

The Court: Yes sir.

[fol. 57] Mr. Norvell: I have authorities from the Supreme Court of the United States which indicate——

Mr. Walker: Understand, may it please the Court, I am not objecting to them showing that the boy was dependent on the father for support, but as to where the boy was or what he was doing, that is all immaterial.

The Court: It is competent for him to show that he was dependent on the deceased.

Mr. Norvell: The only way I can show it is in this line of evidence, I didn't want to put any words in the mouth of the witness.

Mr. Walker: You can ask the witness.

The Court: I will let her answer and I will rule on it.

A. He was in France in the army.

The Court: I will let her answer the question.

To which action of the Court the defendants then and there duly excepted.

Mr. Norvell:

Q. Now prior to the time he went into the service of the Government, had he been working and earning money, or had he been [fol. 58] dependent on your father?

A. He was in school.

Q. Now did you know what your father made, Miss Kennedy, on an average?

A. He made from two hundred to two hundred and fifty a month.

Q. He would vary a little, depending upon the number of runs. I say he had no fixed salary, it varied?

A. Varied between two hundred and two hundred and fifty dollars.

Q. What kind of a provider was he for the family, Miss Kennedy?

A. He was most liberal, gave almost everything he made to us.

Q. Well now of that amount approximately—who did he turn the money over to for the family expenses?

A. My mother.

Q. Of his wages approximately how much would he turn over to your mother for the household expenses and expenses of you dependent children; or stating it the other way, about how much did he reserve for himself for incidental expenses?

A. He reserved very little, about I don't think more than thirty or forty may be fifty dollars.

Q. Ma-am?

A. About fifty dollars what he kept.

[fol. 59] Q. And the rest of it he would turn over to your mother for the household expenses and the support of you dependents?

A. Yes, sir.

Q. What kind of husband and father was he?

A. He was as kind and liberal as he could be.

Q. How was he in regard to interest in the family, that is on the question of advice, counsel and looking after the welfare of Mrs. Kennedy and the children?

A. He was very kind and a very liberal father.

Q. Was he a man who stayed away from home all the time when he was off from work, or stay at home a good deal?

A. He was in most every night.

Q. Now, Miss Kennedy, did he ever advise with you and your sister and John George as to how you should conduct yourselves, or what you should do for your mental and physical and moral development and welfare?

A. Well he had intended sending John George to collect if he hadn't been killed when he returned from the army.

Q. What was your answer Miss Kennedy?

A. He had intended to——

Mr. Walker: We except to that as immaterial.

Mr. Norvell: Now, may it please the Court, the answer to that [fol. 60] question was the main reason I asked the former question Mr. Walker objected to about what young Kennedy was doing at the time. The cases in the United States Supreme Court say this, it is not only the question of the loss of the dollar per se to the plaintiffs; but it is also the question of his loss as a parent and a guide and a father. Now young Mr. Kennedy was temporarily away in the service, foreign service, at that time. Now as to what his advice and care in regard to that young man was and what his intentions were, what the young man lost by his death goes to show whether he was dependent or not, and is relevant on the question of damages. Of course, in a sense it might be considered hearsay, but this is one of the essential facts as to the care, regard, intentions and plans, and all of the cases here, if your Honor cares to hear them.

Mr. Walker: Let me get in the grounds of my objection. The defendant excepts to the evidence, first upon the ground that it is immaterial under the counts of the declaration in this case, and second upon the ground that it is hearsay.

Mr. Norvell: I read from the case of Railroad v. Holbrook, 59 L. Ed. (Reads.)

The Court: I think it is incompetent as being hearsay testimony, [fol. 61] the answer of the witness. I sustain the objection for that reason.

To which action of the Court the plaintiff then and there duly excepted.

Mr. Norvell:

Q. Now, Miss Kennedy, when John George went to France, and, by the way, about how long was it before July 9, 1918, when he went into the army?

A. Let me see——

Q. This accident was July 9, 1918; do you remember about how long before the accident?

A. I think it was almost a year.

Q. Now Miss Kennedy, what were the plans of the family at the time, of your father and the family, at the time that he went into the army?

A. Well——
Q. Just a second.
A. Pardon me, sir.
Q. Namely, that he should continue in the army or elsewhere indefinitely, or that he should return home at the conclusion of the war, when relieved?

Mr. Walker: We object to that on the ground that the plan of the family is immaterial.

Mr. Norvell:

Q. Well, the plans of your father?

Mr. Walker: That goes back to the question the Court just sustained, the plan, that is hearsay.
[fol. 62] The Court: I don't know how she would give an answer to that question except it would be based on hearsay testimony, what the father said or the mother said, it would be competent for Mrs. Kennedy to state about what the future of her son was to be, but would it be competent for this young lady to state what her mother had said to her.
Mr. Norvell: No——
The Court: Or what any other member of the family had said about it.
Mr. Norvell: I think it would be competent for the mother to state, or for the witness to state.
The Court: I sustain your objection.

To which action of the Court the plaintiff then and there duly excepted.

Mr. Norvell:

Q. When did John George return?
A. Let's see——
Q. When did John George return from the army?
A. He returned with the Thirtieth Division, Mr. Norvell, I have forgotten the date.
Q. If I remember, the armistice was November 11, 1918?
A. Yes.
[fol. 63] Q. How long after the armistice did he return?
A. About I think it was three or four months after.
Q. Now thereafter, did he go to work?
A. Yes.
Q. Been working ever since and is now away?
A. Yes sir.
The Court: Not in the army?
A. No.

Mr. Norvell:

Q. After your father's death did you young ladies go to work or not?

A. Yes.

Q. Your mother has not?

A. No.

Q. Now, Miss Kennedy, what other income, if any did your father have at the time of his death?

A. He got a pension.

Q. Do you know how much that was?

A. That was twenty-five dollars a month, or seventy-five dollars a quarter, and he also owned some property which brought twenty-five dollars a month.

Q. That was gross rental?

A. Gross rental.

Q. Well after he paid his taxes, repairs and things like that, do you know what the net rental was?

A. About fifteen a month.

Q. Now that with his wages on the road was all of his income?

[fol. 64] A. Yes.

Q. When you said a few minutes ago that he reserved about forty or fifty dollars a month for his own needs with the exception — and the rest he gave to your mother for the benefit of the family?

A. Yes sir.

Q. Were you including together the pension monty, rent money and his wages and deducting the fifty, or did he keep the pension and the rent?

A. No, he didn't keep the pension and the rent, he gave that to mother.

Q. Now at the time of his death, as you have stated, you yourself and mother were the members of the family at home in addition to your father?

A. Yes sir.

Q. Now, Miss Kennedy, to the best of your knowledge and recollection, I want to get at about how those expenses were divided?

A. You mean for the maintenance of the house?

Q. First I am going to get at it this way. Where were you living, in a house or apartment?

A. Living in an apartment.

Q. At that time, I mean.

A. Yes.

Q. Was that apartment in the house he owned, or was it one you rented?

[fol. 65] A. We rented, in the Aberdeen.

Q. Do you know what the rental was, approximately?

A. At that time the rent was $47.50 a month.

Q. Now did you have any servant of any kind?

A. We had a girl who came once a week and helped us with the housework and we also had a laundress.

Q. Do you know about how much the wages of those two parties were?

A. Well, I think the girl was—we paid her a dollar on Saturday, I think that is the way we paid her, yes and the laundress I think was about two dollars a week.

Q. Now, Miss Kennedy, in addition to the rent, do you know about how much was required on an average for groceries and other incidentals there in the household?

A. I should think, Mr. Norvell, that the up-keep of our household, including rent and laundry was about seventy-five dollars a month.

Q. Do you know about what it cost for clothing and incidentals for you two youn*d* ladies?

A. Well, I think we had an allowance of about seventy five dollars a month.

Q. That is for both of you?

A. Both of us.

Q. Would it be fair to state or not that was equally divided?

A. Equally divided.

[fol. 66] Q. In the long run?

A. Yes.

Q. Did your mother do her own housework with the exception of these two servants you have stated?

A. Yes sir.

Q. About how much do you think it would cost, Miss Kennedy, to cloth- yourself at that time?

A. About two hundred dollars a year.

Q. Now, Miss Kennedy, you say at the time of your father's death he was making anywhere from two hundred to two hundred fifty dollars a month on the road; do you know anything about his wages going back just a little, do you know what they were before they were raised under the Adamson law, or not?

A. No, I don't remember.

Q. You don't know?

A. No.

Q. Now as near as you can remember, how long had he been in the service of the road?

A. He had been in the service of the road forty-seven years.

Q. I mean as long as you can remember?

A. Yes sir.

Q. What — his position at the time he was killed?

A. Engineer.

Q. Had he been an engineer for some time, some years?

[fol. 67] A. As long as I can remember.

Q. Engineer on what train, passenger or freight?

A. Passenger.

Q. Now, Miss Kennedy, you have given your father's age, now please state about his health and his activities and vigor from a mental and a physical standpoint?

A. I can't remember but as long as I can remember one time he was ill, and he was very active, and he *was* never *never* complained, just one time as I say he was ill.

Q. Now was he a very—what was his physical build, was he a very stout or rather a very large man, or was he rather lean and spare, about what would you say was his weight and physical characteristics in that regard?

A. He was not stout, he was rather tall and well built.

Q. You say he had been sick at one time, do you remember how long that was before this accident?

A. About two years.

Q. Was that a very serious malady?

A. No, it was an attack of grip.

Q. Did he recover from that?

A. Yes.

Q. Did you notice any after effects?

A. No, no after effects.

[fol. 68] Q. Had he or not then just as good health within a few weeks after this attack of grip, continued to be as he was before?

A. Yes, sir.

Q. What about his ability to walk and handle himself?

A. Oh he walked always, he walked to the round house every morning and always walked home.

Q. Now in his movements around home and elsewhere, was he a man who was active, and quick?

A. He was a very active, you should imagine a man not very much over fifty instead of his age.

Q. Now, Miss Kennedy, were you at home when this accident happened?

A. Yes.

Q. Your mother was there too?

A. Yes.

Q. John was away in the army; your sister, where was she?

A. She was visiting in Washington.

Q. Washington, D. C.?

A. Yes, sir.

Q. Did you see you- father's body or any portion of his body after this wreck?

A. Yes sir.

Q. Well they brought him home about ten o'clock the night of the accident.

—. ——.

Q. You were not at the scene of the wreck?

A. No.

[fol. 69] Q. You were at home when they brought his body there?

A. Yes, sir.

Q. Did you see enough of his body to recognize him as your father?

A. Yes, I saw his shoulders and head.

Q. How much of his body was it you saw?

A. Beg pardon?

Q. How much of his body was recovered and brought home, you say you saw his shoulders and head?

A. Yes.

Q. Was the lower part of his body recovered and brought home?

A. I couldn't say, Mr. Norvell, because I just saw the——

Q. You just saw the upper portion?

A. Yes sir.

Q. What condition was the upper portion, particularly the head?
A. His head was badly swollen and there was a slight scar on his face here on the right and also one on the left side.
Q. You young ladies were unmarried at the time of the accident?
A. Yes, sir.
Q. And still are unmarried?
A. Yes.
Q. Now going back just a moment, I want to phrase a question a little differently, if I may, and your Honor might stop me if there is any doubt. At the time John George went away to war, how far [fol. 70] had he advanced in school, do you recall, Miss Kennedy?
A. He was in the ninth grade.
Q. Through the primary school?
A. Yes.
The Court: How old was he, Miss Kennedy, at that time?
A. He was sixteen when he joined the army.
The Court: Sixteen?
A. Yes.
Mr. Norvell: Did your father expect upon John George's return from the army to send him to school and to college?

Mr. Walker: Well, we except to that in that particular form upon the ground that that calls for her to state a conclusion of Mr. Kennedy first, and second upon the ground it goes back to the question of hearsay.
Mr. Bryan: May it please the Court, I want to suggest this as to the competency of that question. The family is a unit, what the father has said, what the mother and they have agreed that is the policy, that is a fact, it is not in the ordinary sense hearsay, children know and therefore what the father's intentions were expressed in [fol. 71] the family, whether the son is intended for the arm- or intended for the navy or intended for a banking position, that is an agreed fact, known in the family, which is not on the line of hearsay, and it is competent for any member of the family who knows *that* that purpose was.
Mr. Norvell: I think possibly the question would be more competent in this shape as Judge Bryan suggested or thought in his statement to the Court.

Q. What was the purpose of your father in regard to sending John George to school or college after his return from the army, and I change my question to that form.

The Court: Gentlemen, My ruling may be based on a technicality. But I think that the answer would be incompetent. Now the young man could state what his intentions were when he came out of the army, the reason why he didn't pursue his course. There are others who are competent to testify, and the evidence could be introduced here without relying on anybody's hearsay. Mrs. Kennedy could state what her intention was, why she didn't carry out her intentions. Now it is not necessary to introduce a person who has heard them say what they meant, or persons of course who testify what

they heard the young man's intentions were, the Court sustains the objection.

[fol. 72] To which action of the Court the plaintiff then and there duly excepted.

Mr. Norvell:

Q. Miss Kennedy, was it your intention to go to work had your father not died?
A. No, I had not intended going.
Q. Why did you go to work after your father died?
A. Because it was necessary.
Q. You mean necessary for the money to live on?
A. Yes.
Q. Now let me ask this question further, I have asked you generally about your father's disposition, counsel and advice toward all the members of the family. I want to ask you particularly in regard to John George, as to your brother, was he or not a kind father?
A. Very kind.
Q. Did he or not advise with John George as to what he should do as to his future?
Q. Answer that question, please, Ma-am?
A. Yes.

Cross-examination:

Q. Miss Kennedy, I understood you to say that your father, at the time of his death was making from two to two hundred and fifty dollars a month, your answer is yes?
A. Yes.
Q. Now in addition to that I understood you to say that he drew a pension?
[fol. 73] A. From the Government, he was in the Civil War.
Q. From the United States Government?
A. Government?
Q. He was a Union soldier then?
A. Yes.
Q. How much pension did he draw from the Government?
A. Seventy-five dollars a quarter, twenty-five dollars a month.
Q. Now your mother still draws that?
A. Yes.
Q. What ground of disability was it that was stated to the Government, if you know, that he obtained the pension, what part of his physical make-up?

Mr. Norvell: Not to be technical, I want to make this objection, I think the witness should be asked whether there was a physical disability.

Mr. Walker: And the Federal law did not require it, they increased it in case of disability.

The Court: Ask the question, I will see what she says.

Mr. Walker:

Q. Did you know why it was—I will change the question, did you know why it was that he drew a pension from the Government?
A. All the soldiers do, he was not disabled.
Q. Not in any respect?
A. No.
[fol. 74] Q. He was seventy-two years of age I believe?
A. Yes.
Q. You spoke about him walking from home to the round house; how far?
A. No not to the round house Mr. Walker, to the wash house.
Q. Well, I misunderstood you. Then how far did you live in the Aberdeen apartments at the time your father was killed in this wreck to where he went to work each morning that he worked?
A. How far?
Q. Yes?
A. Well the wash house is on Twelfth Avenue, isn't it, and we lived on 19th and Hayes.
Q. Well four or five blocks he would walk?
A. Further than that and you have to go down several blocks.
Q. And he walked each morning?
A. Yes sir.
Q. Did he ever complain about his back giving out when he came in?
A. No.
Q. He was in good health for a man of his age?
A. Very.
Q. What was the condition of his teeth if you remember, good teeth?
A. Very good teeth.
Q. And he was in good health for a man of his age?
[fol. 75] A. Very good.
Q. Do you know what age his father died?
A. No, I do not.

Redirect examination.

By Mr. Norvell:

Q. Do you know whether or not your mother drew the same pension after your father's death that he drew before his death or not?
A. No, it is for the same amount.
Q. What was it when she first began to receive it?
A. It was less than twenty-five.
Q. Do you happen to recall the exact amount?
A. I don't know the exact amount.
Q. All you mean to say is that it was less at first, but is now twenty-five dollars. Do you know when the Government advanced the widow's pensions to the same amount, twenty-five dollars?
A. I think about three months ago.

Q. Mr. Walker was asking you about your father's walking, did he take exercise or walk, I mean anywheres except to and from the *warm* house?

A. Beg pardon?

Q. I say, when he was off duty there, going in and out of the home, did he go anywhere except to the was- house?

A. Yes, most every afternoon he went out.

Mr. Walker: Now, Mr. Norvell asked you something about this pension being less since your father died.

[fol. 76] Mr. Norvell: Excuse me just a moment.

Q. I didn't catch your answer to Mr. Walker's first question about the pension; he asked you why it was granted, do you know whether or not it was granted on account of a disability?

A. He was not disabled.

Recross-examination.

By Mr. Walker:

Q. You were asked on redirect examination by Mr. Norvell about your mother having received less from this pension since your father died, Miss Kennedy; how much less did she receive in dollars and cents?

A. I don't remember exactly.

Q. He received seventy-five dollars each quarter, didn't he, from the Government?

A. Yes.

Q. And she now receives seventy-five dollars from the Government?

A. Yes.

Q. Now for the time that she failed to receive as much as your father did during his life time, after he died the Government made that amount up, didn't it, so she in fact has received just as much from the Government as your father did?

A. They didn't make that up, they deducted. We got a check, or mother got a check that morning, and it was returned and it was deducted from that.

[fol. 77] Q. But as the matter now stands she receives just as much each quarter as your father did?

A. Yes.

Further deponent saith not.

Mr. Norvell: Now may it please the Court, I want to put Mrs. Kennedy back on a moment, and I will, write out the question, as to what her intention in regard to the boy going to school.

Q. What was your intention as to sending John George to school and to college?

It is stipulated that her answer would be, My intention upon his return from the army was to send him to school and to college.

The Court: That would be the answer of Mrs. Kennedy. To that question counsel objects and it is overruled.

Mr. Walker: Counsel object to it because it is irrelevant and immaterial.

Objection overruled.

To which action of the Court the defendants then and there duly excepted.

[fol. 78] Miss ANNA MAI KENNEDY, next witness for plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. M. T. Bryan:

Q. Miss Kennedy, what is your first name?

A. Anna Mai.

Q. Miss Anna Mai Kennedy, you are the daughter of Mrs. Kennedy that is the plaintiff in this case?

A. Yes, sir.

Q. And the late D. C. Kennedy, who was killed in the railroad accident which has been described here?

A. Yes.

Q. At the time of the death of your father, how many members of the family were there?

A. Three, my sister—well, four there were four, my mother, my sister and my brother and I, and father of course.

Q. How many of the family lived at home?

A. Just my sister and I, my brother was in the army in France.

Q. Your mother of course?

A. Yes.

Q. How long was it after your father's death that your brother returned?

A. About a year, almost a year.

Q. He returned from where?

A. From France, with the Thirtieth Division.

Q. Before his entry into the army what was his age, or at the [fol. 79] time of his entry?

A. Sixteen.

Q. What did he do prior to that time?

A. He was in high school.

Q. He was a high school boy?

A. Yes.

Q. And in what grade was he at the time he quit school to go into the army?

A. In the ninth grade.

Q. Had you or your sister prior to the time of the death of your father at any time been in any employment?

A. No.

Q. Who supported, took care of you?

A. My father.

Q. He was in the railroad service?
A. Yes, sir.
Q. In what capacity?
A. Engineer.
Q. With what Company?
A. N. & C. Railroad Company.
Q. State to the Court and Jury how long he had been there from your own knowledge?
A. As long as I can remember.
Q. He was in the service then of the railroad Company commencing with your earliest recollection?
A. Yes sir.
Q. And did he so continue down to the day of his death?
[fol. 80] A. Yes, sir.
Q. And in the same capacity, as engineer?
A. Yes sir.
Q. Was he engineer of a passenger train?
A. Yes, sir, and as I remember the same run.
Q. State, Miss Kennedy, if you please, whether your father was a home man, stayed at home?
A. He stayed most of his time at home, when he was off the road.
Q. When he was off the road, most of his time he stayed at home?
A. Yes, sir?
Q. What were his relations with your mother and you children, were they intimate and friendly, or otherwise?
A. He was a very kind and loving father, very considerate and wanted us to have everything we wanted, and looked out carefully for all our needs.
Q. What did he do with his wages when he received them?
A. Turned them over to mother.
Q. State whether or not your mother had charge of the expenditures of the funds for the living, support and dress of the children and family?
A. She did.
Q. Did he retain any of his wages or moneys for his own expenditures?
A. A small amount just for his own personal expenses.
Q. How is that?
[fol. 81] A. A small amount just for his own personal expenses.
Q. State whether or not as near as you can how much he was in the habit of retaining?
A. I should say not over forty dollars.
Q. Forty dollars a month?
A. Forty dollars a month.
Q. How much did he earn?
A. Between two hundred and two fifty, mostly over two hundred.
Q. And that he gave to whom?
A. To mother.
Q. State whether or not he took an active interest in his children, their welfare, whether he looked after them.

A. He was always very interest- in everything we did and wanted us to have just as much as any body else.

Q. State whether or not he was in the habit of counseling and advising and directing the children?

A. Yes, he was.

Q. State whether or not in their development he watched after them or advised them?

A. He did.

Q. Counselled them?

A. Yes, sir.

Q. Do you know whether or not he intended John George should be educated in College?

A. He did.

[fol. 82] Q. Do you know whether or not he intended John George should be educated in college?

A. He did.

Q. Do you know whether or not——

A. I heard him say that he expected——

Q. Now wait, I don't want to run counter to Your Honor's ruling, I want to know first whether she knew it or not.

The Court: As to how she knows it, I think that would be incompetent.

Mr. Bryan: She just said she heard him say and there she stopped, Your Honor rules it incompetent?

The Court: Yes, sir.

Mr. Bryan: Your Honor, allow me to note an exception to the ruling of the Court upon that.

To which action of the Court the Plaintiff then and there duly excepted.

Q. Now, Miss Kennedy, in regard to your father's physical health, was he a man that enjoyed good health or not?

A. He was in excellent health, very active.

Q. Tell the jury the character of build of man was he a large heavy man or was he a man of medium size and build? Describe to the jury what kind?

[fol. 83] A. He was rather tall, a man of about your height, Mr. Bryan, not heavy, he was well built, very muscular.

Q. He was physically active?

A. Very.

Q. Was he energetic or sluggish in his movements?

A. Very energetic, and I have seen him just a few days before I left for Washington, indulge in a very active ball game.

Q. A what?

A. Ball game.

Q. Baseball?

A. Yes, sir.

Q. With whom?

A. With young boys across from our house.

Q. How long before his death?

A. That would be about three weeks.

Q. Was he a man that walked much or took physical exercise other than what you have mentioned?

A. Yes, he did, he never rode a street car, walked all the time.

Q. Was his figure erect or did he stoop?

A. No, very erect.

Q. Now in regard to the expenditure of money for the support of yourself and your sister and brother, do you know what it cost and your mother, do you know what the expenditures per month say for your mother has been?

A. Well, you mean her personal expenses?

Q. Yes, personal expenses?

[fol. 84] A. Well, I couldn't say just about how much it would be monthly, but I suppose for her clothes and personal expenses not over two hundred dollars a year, around that.

Q. Two hundred dollars a year.

A. For mother.

Q. And what would it be for you and your sister?

A. Our allowance was about seventy-five dollars a month between us.

Q. Do you know what the running expenses of the house were, groceries and other things?

A. Well, I can't give you an estimate of each article, the apartment was $47.50 a month and the grocery bill was about $40.00, and the servant, the girl we had about a dollar each Saturday, I know it was pretty close to the amount.

Q. Well, how about the cost of supplies, like table linen table ware and things like that are consumed in living.

A. Well, I don't know, Mr. Bryan, just about how much that was, of course, mother bought every thing for the house, I don't know how much they amounted to.

Q. Miss Kennedy, you have stated, given us an estimate of the cost of the clothing and personal expenses of yourself, your brother, sister, your father and mother; state whether or not the remainder of the moneys he collected went toward the household expenses.

A. I did.

[fol. 85] Q. State whether or not since your father's death you have gotten employment anywhere?

A. Yes.

Q. Why did you do this?

A. Because it was necessary, the expenses of the house.

Q. Are you now employed?

A. Yes, sir.

Q. With whom and in what capacity.

A. Teacher.

Q. You are a teacher?

A. Yes.

Q. Up to the time of your father's death, he took care of you?

A. Yes, sir.

Q. Miss Kennedy, is your mother physically defective in any way, in hearing?

A. Yes, her hearing, she is stone deaf.
Q. She is stone deaf; was she at the time of your father's death?
A. Yes.
Q. How long has she been in that condition?
A. Well as long as I can remember.
Q. As long as you can remember. State to the Court and jury, if you please, what is her present condition of health?
A. Well her present condition of health is very good.
—. ——.
A. Yes.
Q. Was she ill following the death of your father?
[fol. 86] A. She was for some time.
Q. Has she recovered?
A. Yes.
Q. As well as ever?
A. Yes, sir.
Q. That is prior to your father's death?
A. Yes.

No cross examination.
Further deponent saith not.

[fol. 87] W. G. Jones, called by the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Norvell:

Q. This is Mr. Will Jones?
A. Yes, sir.
Q. What is your occupation, Mr. Jones?
A. I am embalmer with Dorris, Karsh and Company.
Q. You are the husband of the daughter of Mr. and Mrs. Kennedy not a party to this suit?
A. Yes, sir.
Q. She married you sometime before Mr. Kennedy's death?
A. Yes, sir.
Q. Now, Mr. Jones, how long have you known Mr. Kennedy prior to his death?
A. I have known Mr. Kennedy about twenty years.
Q. How long had you known him intimately, have you been in the family that long?
A. No, I have been in the family about seventeen years.
Q. You came into pretty intimate contact with him then during the seventeen years, visited back and forth?
A. Yes, sir.
Q. Mr. Jones, what was Mr. Kennedy's health at the time of his death?
A. Fine, as far as I know.

Q. What was his general health and physical condition as long as you knew him?

[fol. 88] A. Fine, I never knew him to be sick.

Q. Now, Mr. Jones, what build man was he, was he very fleshy or not?

A. Mr. Kennedy was a man I suppose six foot maybe an inch over and would weigh about a hundred and eighty-five pounds, I should judge.

Q. In regard to his physical activity, Mr. Jones? How was he, active or how?

A. Very active, very active.

Q. Did you ever observe him at his home in the presence of the members of his family and with his family?

A. I have.

Q. You and your wife lived in Nashville and you visited?

A. Oh, yes.

Q. What was his disposition and actions——

A. His disposition——

Q. Wait a moment, what was his disposition and actions toward his widow and these two young ladies and John George, the members of his family here suing, was it kindly and affectionate or not?

A. It certainly was.

Q. Was he or not a man who neglected either his wife or his children?

A. Not that I ever knew of. I don't think he ever did.

Q. He was a good family man?

A. He certainly was.

[fol. 89] Q. Mr. Kennedy, do you remember this wreck in which he lost his life?

A. Yes, sir.

Q. I mean Mr. Jones?

A. I do.

Q. Where was the wreck?

A. The wreck was out on the N. & C. tract right close to St. Mary's Orphanage, right this side of the overhead bridge that goes to the orphanage.

Q. Just off the Harding road, on the Bosley Springs road?

A. Yes, sir, beyond Bosley Spring.

Q. Did you go out there?

A. I went out there, yes, sir.

Q. How long were you there after the wreck was supposed to have occurred, about what time did you get there?

A. I was at the Union Station the morning he went out, seen him go into the dispatcher's office at the Union Station, didn't speak to him that morning, I went on home to breakfast, and the telephone rang, and I knew he was in it, of course I didn't say anything to my wife, rushed right to the scene, I was there in twenty or thirty minutes after the wreck occurred, I was there before the wreckers got there.

Q. Now just generally, what was the condition out there, where was his engine and the other engine?

A. Now, of course, I don't know the exact positions of the engines, but if I remember right his engine, was to the right of the track.
[fol. 90] Q. His engine was going out?
A. Yes, sir, the coaches were telescoped and the boiler of his engine was lying to the right of the track.
Q. They were all torn to pieces?
A. Yes, sir.
Q. Just generally several of the coaches were badly telescoped?
A. Yes, sir, badly telescoped.
Q. Did they find his body?
A. Yes, sir.
Q. Were you there at the time they found it?
A. Yes, sir, I was there at the time they discovered it was his body under the engine, a party came to me and I told them it was his body.
Q. They told you to go where the body was, did you go there?
A. Yes, sir, climbed down in that debris where the body was supposed to be and lifted a paper off his face and recognized it was him. It was *all* him black and dirty, but I recognized it was him, he had a prominent nose.
Q. Where was he?
A. All down under the w-eels and iron, debris all over him, he was down under this mess.
Q. Heavy beams, wheels, iron and wood?
A. Just a mass of wreckage, down under there, we could just see his head and shoulders.
A. How long was it after you got there before you were told that this body had been discovered?
[fol. 91] A. Maybe an hour afterwards, may be an hour and a half before they discovered his body.
Q. Were you there while it was being taken out?
A. No, sir, I wasn't. I come back to down with the train load of dead that they had brought out of the coaches, and they said it would probably be an hour of more before they could begin again over there and life this debris off of his body, and I came back in the empty baggage car and with those bodies going back to dispose of them, and started back to the wreck when I met engineer Kern out on Broadway about Twentieth Avenue coming back with his body in the wagon.
Q. You did see his body after it was taken out?
A. Yes, sir.
Q. How much was recovered?
A. Only recovered from a little above his hips, part of his limbs we never did find.
Q. They were cut in two?
A. Cut in two evidently and burned.
Q. With reference to the body, what would you say the condition of his head was?
A. His head was scalded, that is the body was scalded.
Q. It was swollen?
A. Swollen, yes, sir, very badly.

Q. Was the portion of the body you saw burned?

A. The reason I said it was burned, the burn tinered the flesh at the lower abdomen, showing the lower part must have burned.

Q. Mr. Jones, that accident was in Davidson County?

A. Yes, sir.

[fol. 92] Q. Nor, Mr. Jones, you also came into contract with your mother-in-law, Mrs. Kennedy, did you not, after you were married?

A. I certainly did, yes, sir.

Q. Is Mrs. Kennedy stone deaf?

A. Yes, sir, she certainly is.

Q. Do you know how long she has been in that condition?

A. Ever since I have known her she has been deaf ever since I have known her.

Q. Do you know whether or not she had any vital trouble or is in fair health?

A. I don't understand, Mr. Norvell.

Q. I say, do you know whether or not she is in fair health at the present time, or has any vital trouble or is in fair health?

A. She isn't at the present time, no, sir.

Q. She was sick after this accident?

A. Yes sir.

Q. Now, Mr. Jones, you say you saw him down at the Union Station that morning?

A. Saw Mr. Kennedy in the station, yes sir, seen him go to the dispatcher's office underneath the train master's office there, I was shipping a body on that early train.

Q. You didn't speak to him I believe you say?

A. No, sir.

Q. What did *not* condition appear to be that morning?

A. About as usual; he had on his cap and was going underneath in that train dispatcher's office, and I was late for breakfast, I didn't [fol. 93] go down and *and* talk to him when I seen him there, I generally go and talk to him when I see him there, but I didn't this morning, I just went on home to breakfast.

Q. You know hoe old Mr. Kennedy was, or about?

A. About, yes, sir.

Q. Approximately what was his age?

A. About seventy-three.

Q. Now, Mr. Jones, what would you say as to his physical activity and vigor, as compared to an average man of his age?

A. Well, he was more active than any man I ever knew at his age.

Cross-examination.

By Mr. Walker:

Q. You say Mrs. Kennedy is now in good health?

A. No, sir, I wouldn't consider her in good health now.

Q. Would you say she is in bad health?

A. She doesn't look like the same woman really since this trouble has come on her, she has lost in weight, she is awful nervous, she is a nervous wreck.

Q. You reached there about twenty or thirty minutes after it happened?

A. I was at the wreck I guess I was out at the wreck in twenty or thirty minutes after it happened I guess.

Q. Do you know what time it happened?

A. It must have happened a few minutes after seven o'clock.

Q. You went out there in an automobile?

A. I went out there in an automobile, yes, when I was there [fol. 94] wasn't but seven or eight machines there, just a few of them on that drive, wasn't many of them there.

Q. The last time you had seen Mr. Kennedy alive was in the Union Station?

A. Yes sir.

Q. A short time before the train he was pulling out of the station?

A. Yes sir.

Q. Now, when you got out there you saw that the two trains had collided?

A. Yes, sir.

Q. He was pulling the train that was known as number four, wasn't he?

A. Yes, sir, going out.

Q. And the train with which his train collided was an inbound train coming into the sheds at Nashville, known as number one?

A. Yes.

Q. They were both passenger trains?

A. Both passenger trains.

Q. His train, the one that he pulled was what was called a flag train, that is to say it stopped at every flag station?

A. I don't know anything about that.

Q. Don't know about that, well train number one with which his train collided was a fast train, wasn't it?

A. Supposed to have been.

Q. Had sleepers on it?

A. Yes.

Q. Now when you got there you saw both of the locomotives both [fol. 95] the one that he was driving and the one with which he had collided, they were turned over and demolished, and practically torn all to pieces, weren't they?

A. They were, yes sir.

Q. And the first three or four cars on the train that he was pulling had become telescoped and were piled up on top of each other?

A. They were, they were telescoped, yes sir.

Q. Now the first two or three coaches on train number one they were turned around, and one of them was telescoped wasn't it?

—. ——.

A. You saw dead people lying everywhere, didn't you?

A. I certainly did, yes, sir.

Q. How many dead people did you take out of that wreck and bury?

A. I have really forgotten the number that we handled from that wreck, that is our firm.

Q. As a matter of fact there were eighty-seven actually killed?

A. Something like that.

Q. And about a hundred injured?

A. Yes.

Q. Just about a hundred injured?

A. Yes, sir.

Q. The track was torn up along there consider-bly?

A. Yes.

Q. Mr. Kennedy's train was proceeding in the direction of Hollow Rock?

A. Yes, going south, or west I believe they call it there.

Q. That is train number four?

[fol. 96] A. Train number four.

Q. Train number one was proceeding in the direction of Nashville?

A. To Nashville.

Further deponent saith not.

Court here took the usual noon recess.

[fol. 97] J. P. EUBANK, called by plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Norvell:

Q. Mr. Eubanks, where do you live?

A. 1113 Sigler Street.

Q. Nashville, Tennessee?

A. Yes sir.

Q. What is your present occupation, Mr. Eubank?

A. How is that?

Q. What is your present occupation?

A. Working in a machine shop.

Q. For whom?

A. N. C. & St. L.

Q. Out here at the shops towards West Nashville?

A. Yes, sir.

Q. Mr. Eubanks, how long have you been in the employ of the N. & C. Road in one capacity or another, approximately?

A. About thirty-seven or eight years.

Q. On July 9, 1918, at the time of this accident, what was your position with the road then, what did you do?

A. Conductor.

Q. You were run-ing on number four that morning?
A. Yes, sir.
Q. After the accident, Mr. Eubanks, did the railway displace you as a conductor and then put you in the machine shops?
A. No, sir.

[fol. 98] Mr. Walker: We object to that.
The Court: Sustain your objection.

Mr. Norvell:

Q. How long did you remain a conductor after the accident, Mr Eubank?
A. How is that?
Q. How long did you remain a conductor after the accident?
A. As conductor?

Mr. Walker: We object to that.
The Court: I will let him answer that question.

A. I wasn't conductor any longer than that day down there after it happened?
Q. How long had you been a conductor prior to that time?
A. Thirty years.
Q. On the morning of the accident, Mr. Kennedy was the engineer on the train?
A. Yes, sir.
Q. How long had you been running with Mr. Kennedy, Mr. Eubank?
A. How long had I run with him?
Q. Yes, sir.
A. Oh, something like three years I reckon, I couldn't say for sure.
Q. Off and on?
A. How is that?
[fol. 99] Q. Did you or he change your run or his run?
A. Once in a while he would lay off and maybe I would lay off a trip.
Q. Now, Mr. Eubanks, what time was number four due to leave the union station?
A. I think it was seven o'clock at that time.
Q. So that number four was the train you and Kennedy were running on?
A. Yes, sir.
Q. Number four on its usual run would leave the Union Station you say at seven o'clock as you recall, going out west on the Northwestern Division?
A. Yes, sir.
Q. Where was the terminus to that train, where it stopped finally, where did it run to, I don't mean that morning, I mean regularly?
A. We went to Hickman, Kentucky regularly, the train we carry out of there goes to Memphis.

Q. How is that?

A. Our schedule went to Hickman, Kentucky, that is the one we run through on.

Q. I mean the conductor and the engineer and the other members of your train crew?

A. Yes, sir.

Q. Was from Nashville, Tenn. to Hickman, Ky.?

A. Yes, sir.

Q. And then back of course?

A. Yes sir.

Q. And it was to Hickman, Kentucky that train was starting that morning, or where it would have gone if there had been no accident?

[fol. 100] A. Yes, sir.

Q. And I believe you say the time of leaving was seven o'clock, did you all get off on time that morning?

A. About seven five as well as I remember leaving here.

Q. You think you were a minute or two late?

A. How is that.

Q. Is it your recollection you were a minute or two late that morning?

A. Something like that, five minutes.

Q. Did you get any orders that morning?

A. Yes, sir, we received an order down there that morning.

Q. Well now, who *h*ave you the order?

A. The operator.

Q. Can you tell me his name?

A. Oden is all I know about his name.

Q. He gave a copy to you.

A. Yes, sir.

Q. Did he give a copy to Kennedy?

A. Yes, sir.

Q. You saw him when he delivered the order to Kennedy, now what kind of a train was this you were running on, by that I mean was it a fast train or slow train?

A. Well, I con-*di*ered it a fast train, it was a local train, stopped everywhere nearly.

Q. About what did you make between stations when you got out on your run beyond the city, about what speed would you make between stations?

A. We would have to make it something like thirty miles an [fol. 101] hour, I guess, maybe thirty-five.

Q. That was a passenger train?

A. Yes, sir, that was a passenger train, local.

Q. Composed of course of *en* engine, tender and baggage car?

A. Mail car.

Q. Mail car and then passenger coaches?

A. Yes, sir.

Q. Did you all carry a sleeper or chair car?

A. No, sir.

Q. Did not?

A. Had five big coaches.

Q. Five big coaches?
A. On the rear for passengers to ride in there.
Q. They were wodden passenger coashes?
A. I think some of them were steel, I am not sure.
Q. But your recollection is that you had a mail car and baggage car?
A. We had a mail car and baggage car, what we call a combination car.
Q. Just one?
—. ——.
Q. Now Mr. Eubanks, do you remember what your order was that morning?
A. How is that?
Q. Do you remember what your orders were that morning?
A. What the orders were?
Q. Yes?
A. Well, I don't remember, I remember of course the biggest words of it.

Mr. Norvell: May it please the Court, I have Mr. Templeton un-[fol. 102] der subpœna and he asked me to call him, and he hasn't gotten here. What I wanted was the order.

Mr. Walker: I have the order.

(Passed to counsel.)

Mr. Norvell:

Q. To refresh your recollection, Mr. Eubank, I hand you what purports to be a copy of that order produced by counsel for the railroad and which I agree is a copy, and see if you can recollect?
A. Yes, sir, this looks like the order we received that morning, the wordings of it.
Q. May I read it here with you and see if I read it correctly; It is headed here, Nashville, Chattanooga and St. Louis Railroad, form 19 train order No. 29, Nashville, July 9, 1918 to C. & E. that means conductor and engineer does it? No. 4, at Nashville, No. 4, engine 282, hold main track, meet No. 7, engine 215 at Harding.
A. Yes, sir.
Q. Signed E. B. P. superintendent. Conductor and Engineer shall each have a copy of this order made com. at 7 A. M. Oden, operator. That is correct, isn't it?
A. Yes sir.
Q. What was No. 7?
A. No. 7 was what we called an accommodation train, passenger train.
Q. What was number one?
A. Number one was a passenger train.
[fol. 103] Q. Which was due in here first, number one or number seven?
A. Number one.

Q. By way of refreshing your recollection, you stated that your regular time of leaving here to be about seven o'clock, since reading that order showing the direction there at the bottom and seven A. M. Nashville, do you recall whether or not seven o'clock was the leaving time?

A. Seven o'clock was our leaving time, but we didn't receive that order in time to pull out on time, and maybe the station mast- was holding us for mail, we never pulled out from under the shed until the station master says he is ready.

Q. The station master gave you the order?

A. He came over to our train and he said he was ready and we pulled out.

Q. What time was number one due, in other words what was the schedule time for number one to arrive?

A. Seven ten.

Q. Then the schedule time for number one to arrive was after the time for you to leave?

A. After the time for me to leave.

Q. Well put it the other way, you were scheduled to leave ten minutes before number one pulled in, is that right?

A. Yes sir.

Q. Now when she was on time where would you generally meet her?

[fol. 104] A. Sometimes she would pull into the shed before we would pull out.

Q. That was when you were a little late?

A. Sometimes it would come in ahead of time a little, not often.

Q. There in the shed, you mean the Union Station?

A. The Union Station.

Q. I say, when she was on time, where would you generally meet her?

A. I say, when she was on time, where would you generally meet her?

A. Sometimes between there and Cedar Street and sometimes between there and the shops, somewhere along that double track.

Q. Mr. Eubank, when you got your order, your copy of the order, to whom did you show your order or to whom did you give it?

A. I give it to the flagman, but I read it to the porter, and Uncle Dave and myself read our orders to one another.

Q. Your porter was a colored man?

A. Yes, sir.

Q. Was he killed in the wreck or not?

A. Yes, sir.

Q. He had been running with you some little time, or had he?

A. He had been running with me some little time on that run.

Q. Your flagman, how long has he been running?

[fol. 105] A. That was his first trip out with me.

Q. You have been running on number four for some little time then, hadn't you?

A. Myself?

Q. You, yourself?

A. Yes, sir.

Q. *Yes, sir.*
Q. Then as far as you know it was his first run on number four?
A. His first ran on number four with me.
Q. Do you know whether or not — had run on any passenger train before that time?
A. No, sir, I do not.
Q. Where was the usual position of the porter on the train?
A. Porter?
Q. Yes, sir.
A. Head platform, the head coach.
Q. Where was the usual position of your flagman? While your train was in motion?
A. Well, leaving here he would catch the rear end and go through and meet me and I would give him the order, then I couldn't tell you anything about between there and Bellview, exactly about the flagman.
Q. Where did he meet you that morning?
A. When I give him the order?
Q. Yes, sir, what part of the train did you meet him, about where?
A. I think it was in the ladies car, second coach.
Q. How far had the train proceeded?
A. I think it was over here the other side of Cedar Street when I [fol. 106] met him.
Q. Now Mr. Eubanks, your rules of the railroad require the conductor on a passenger train to show or give their orders to the flagman and the engineer to show or give his copy of the order to the fireman?
A. I suppose that is the rule.

Mr. Walker: I except to that, the rule is the best evidence.
The Court: Yes, sir, I sustain the objection.
Mr. Norvell: Hand me your rule book.
(Passed to counsel.)

Q. Now, look at this cou-sel for railroad handed me, your rule book at the time of this accident, you were furnished a copy of the rule book weren'*y* you supposed to familiarize yourself with it?
A. Each one of us has a rule book.
Q. You recognize that as the rule book of the Nashville, Chattanooga & St. Louis Railway?
A. It looks very much like the rule book.
Q. I hand you this book and look at the second sentence of rule 211A and see whether I read this correctly: "On passenger trains conductors must show all train orders to flagmen, and enginemen must show the fireman. On other trains conductors must show to rear brakemen and enginemen must show to firemen and front [fol. 107] brakemen."
I will ask you to state whether or not your rules provided that on passenger trains that the conductors shall show *that on passenger trains that the conductors shall show* all train orders to flagman and the engine men shall show their orders to the fireman? Isn't it so stated in the book?

A. That is the way it is stated there.

Q. That was — you did in compliance with the rule that morning?

A. I gave my order to the flagman.

Q. Now Mr. Eubanks, as you proceeded, your train, rather proceeded on, pulled out of the station, went through the yards, went across Cedar Street and then it goes across the trestle over toward the packing plant, and your track goes out to the shops in that direction, in the direction of where the accident occurred; after you pulled out of the station, what were you doing?

A. Taking up tickets to see where the passengers went.

Q. Did any train at any time pass while you were taking up tickets?

A. There was something passed my train up near the Charlotte Pike bridge.

Q. That is a double track on out to the shops, isn't it?

[fol. 108] A. Yes, sir.

Q. When you are going by the Charlotte pike bridge there, your train would be running on the right and the train that passed coming in, was on the left of your train, your left.

A. No, it was on my right coming in the way I was headed taking up tickets.

Q. The left of your train, I mean?

A. Well.

Q. Suppose the trains were, as far as the trains were concerned your train was on the right?

A. Yes, sir.

Q. And the other train was on the southerly side?

A. I couldn't say whether it was a train or what it was, but it was something with steam.

Q. Well something with steam passed. Now did your porter or your flagman at any time before the collision advise you what this train was that passed or what this thing that had steam in it was that passed?

A. No, sir, haven't yet.

Q. Did you ask either one of them?

A. I hadn't seen them until we hit.

Q. About how far is it from the Charlotte pike crossing to where the accident happened?

A. Where the accident happened?

Q. Yes, sir?

A. About two miles I reckon it was.

Q. It happened at what they call Dutchman's grade?

[fol. 109] A. A little below Dutchman's grade.

Q. But up about the catholic orphan asylum?

A. Yes, sir.

Q. May be a little more than two miles?

A. It may be a little more than two miles from the Charlotte pike over there.

Q. After you passed this train, or this thing with steam in it, some kind of an engine, your train went on on its regular course on by the shops by the tower on the shops and out on to that single track, that is correct, isn't it?

A. I suppose that is the way.

Q. On the morning of the accident?

A. Yes, sir.

Q. Your train proceeded on out by the shops by the tower and on out on the single track, there is a single track from the tower on the shops?

A. Yes, sir, single track after you leave the shops.

Q. In other words from the time you leave the station until the time you get to the tower at the shops there are several different tracks, in fact part of the time you are passing through the yards, aren't you, when you first leave the Union Station, there are possibly fifteen or twenty tracks there?

A. Yes, a yard full of tracks as soon as you leave the station.

Q. Then after you cross Cedar Street when you go off on the trestle is that a single trestle or a double trestle?

[fol. 110] A. It is a double track trestle.

Q. And after you get over to the stock yards, after you leave the trestle, for a while there are five or six tracks?

A. They are leading out to different plants and some cross-overs.

Q. Then you get down to a double track, and finally a single track, after you leave the tower at the shops, that is substantially correct, isn't it?

A. Yes, sir.

Q. In going through the yards at that time of the morning, are there usually some switch engines passing around?

A. Are they usually there?

Q. Yes?

A. Once in a while you will catch a switch engine over on the opposite track switching, but when the other train is run that way I don't know whether they would be or not.

Q. I don't mean on the other track, I mean out in the yards?

A. There are switch engines over here to the shops, scattered about in places.

Q. Now Mr. Eubanks, you stated about where your train was when this other train or engine passed at the Charlotte pike crossing, you have stated you were taking up tickets?

A. Yes, sir.

Q. Where were you in your train, what was the *the* physical loca-

[fol. 111] tion of that part of the train where you were, did you go to get a lookout at what was passing?

A. How was that?

Q. You said you were taking up tickets when something passed you?

A. Yes, sir.

Q. This something passed to the left of your train. When this something passed you stated you were taking up tickets what was between you and this train, did you see what it was?

A. It was a box smoker sits in the end of the car, I started around to look out the side window, I found it standing full of people, couldn't get out to see, and I went to work to taking up tickets then again, couldn't see what it was.

Q. Then the smoker and these people standing there were between you and whatever it was?

A. Blocked the aisle so I couldn't get around, couldn't get out to see.

Q. Was this engine, train, or whatever it was, was that on the track that number one was supposed to pull in on, or not?

A. Yes, sir.

Q. When the train went on past the tower on the shops, and got on that main track, did you know whether number one had passed you or not?

A. No, sir, I did not.

Q. You did not stop the train or give any signal to the engineer to stop?

A. No, sir.

[fol. 112] Q. Now just exactly what control, I mean in regard to physical equipment, does a conductor have over a train? In other words, if he should want to stop a train, or should think it should be stopped, can *be* pull the bell cord to notify the engineer?

A. Yes, sir. And then if he don't stop he can pull another cord in there.

Q. That is what you call the angle cock?

A. Emergency valve.

Q. In other words the conductor can stop the train by a signal to the engineer or by working the emergency valve himself?

A. I reckon working the emergency valve would stop the train.

Q. Now in regard to the first means of communication I asked you about, you do have a signal don't you, that is understood on your road by a simple pull of the bell cord that indicates the conductor wants the train stopped?

A. Yes, sir.

Q. How many times do you pull?

A. Pull twice while he is running.

Q. That was thoroughly understood by engineers and conductors on your road while running that was the signal for the engineer to stop?

A. Yes, sir.

Q. Now Mr. Eubanks, you didn't on that morning angle cock the train or stop signal it?

A. No, sir.

Q. Do you know where this concrete bridge is over the track out there at the orphan asylum?

[fol. 113] —. Yes, sir.

Q. With reference to that bridge, where did this collision take place?

A. Right this side of it.

Q. It was a head on collision, wasn't it?

A. Yes, sir.

Q. Yes, sir.

Q. A pretty bad wreck, the engines were broken all up, some of the cars telescoped, track torn up and a great many people killed and injured, that is correct, isn't it?

A. Yes, sir.
Q. Now of your train crew how many were killed in that wreck?
A. My train crew?
A. Yes, on number four, how many of them were killed?
A. Three of them.
Q. Mr. Kennedy was killed; was his fireman killed?
A. Meadows that was his fireman.
Q. Was he killed?
A. Yes, sir.
Q. Was the porter killed?
A. Yes, sir.
Q. Of the train crew proper then, that only left you and the flagman who was not killed, of course there was an express messenger and baggage man?
A. They were both left.
Q. I say, they didn't have anything to do with the operation of the train, of the train crew proper then there was only left you and the [fol. 114] flagman surviving after the accident?
A. Yes, sir.
Q. Did you ever see the flagman after the accident?
A. No, sir, not that day.
Q. Sir?
A. Not that day.
Q. Have you seen him at all?
A. I seen him one day about a week after the accident.
Q. Do you know where he lives now?
A. No, sir, I don't, didn't know where he lived then.
Q. Do you know his occupation now.
A. No, I don't.
Q. Do you know any means of locating him at all?
A. That was the only time I met him when I handed him the order.
Q. Whether he is employed by the road or where he is, you don't know?
A. No, sir.
Q. Mr. Kennedy what was this flagman I believe you stated was named Sinclair or St. Clair.
A. Sinclair I think it was.
Q. What was Mr. Kennedy's physical appearance?
A. Very good.
Q. As of health, was it good or not?
A. I say it was very good from his appearance.
Q. Was he an active man, Mr. Banks?
A. I thought he was to his age.
Q. When you saw him that morning at the union station when [fol. 115] the order was given, did he appear to be in his usual good health?
A. Yes, sir, I didn't see any change in him, at least, I didn't notice any.
Q. You saw him when the orders were given, did you see him any more?

Q. You saw him when the orders were given, did you see him any more?

A. We walked over from the office over there to the train together.

Q. Sir?

A. We walked from the telegraph office over to the train together, one or two tracks over.

Q. That is some few feet?

A. Yes, sir.

Q. And were just talking incidentally?

A. Yes, sir.

Q. So you had an opportunity to observe his appearance and demeanor and you saw no change from the usual?

A. No, sir.

Q. Did you ever see his body after the wreck, did you see him taken out?

A. I seen his body up here at the undertaker's shop.

Q. That was after he had been taken out, but you never saw the location of his body out at the wreck?

A. No, sir.

Q. Mr. Eubank, when this engine or train passed you out there by the Charlotte Street bridge, I will ask you whether or not you didn't [fol. 116] think it was number one, that was the reason you didn't stop?

A. Well I never give it any thought but what it was number one, after he passed the shop, you know, he was on the hind end where he could see the number of engines and everything, and I just supposed it was number one.

Q. Now, Mr. Eubanks, let me get exactly your location, out there at the place where the accident happened, what is the physical location out there, are you in a cut, or are you on legal ground?

A. Well, it is a little bit down grade on a curve where they struck.

Q. I say, you are in a cut there, aren't you?

A. No, sir.

Q. Sir.

A. No, sir the rear end of my train was in the cut, right at the mouth of the cut.

Q. What about the train that was approaching you, was it in a cut?

A. No, sir, it was coming down on a little fall right on the viaduct.

Q. Don't the viaduct pass over a cut there?

A. No, sir.

Q. You were just coming out of a cut?

A. I was done out of it, the rear end of my train stopped right at the mouth of the cut.

[fol. 117] Q. Is there a curve there?

A. Yes, sir.

Q. Which direction is the curve, Mr. Eubank?

A. Well the way we were headed it was on our right.

Q. Now with a train we will say at the point where you were, what space of clear track is there in view.

A. I couldn't hardly tell you, Captain, up on the engine you can

get down on the ground and see a pretty good ways, but sitting up on an engine I don't know how far it would go.

Q. You don't know how sharp that curve is?

A. No, sir, I don't know what is the degree of it.

Q. Now what I started to ask you, Mr. Eubank, which coach were you in when this thing passed you on the Charlotte Pike?

A. I think I was in the first ladies' car, near the rear.

Q. Now we will say this is west from the way your train was running, we will say this is that coach you were in, if I understand you correctly, you were proceeding toward the rear of the train?

A. How is that?

Q. If I understand you correctly, you were taking up the tickets walking towards the rear, you started at the front?

A. Yes, sir, always.

Q. This is the rear down here, Mr. Eubank, and approached your [fol. 118] train was coming and here is the coach you were in, at what part of the coach were you at the time this passed? In other words were you at the front end of that coach or had you gotten to the back end?

A. When that engine passed me I had just got to the front end.

Q. You stated this other thing passed you from the left of your train; now as you enter in from this coach, on which side is the smoker?

A. The smoker was right on my right.

Q. On your right or on the left of the train?

A. Yes, sir.

Q. In other words, the smoker was——

A. Right in that corner there.

Q. The smoker just out there, so that the aisle as you turn?

A. Yes, sir.

Q. In fact making a correct drawing I believe there is nothing between the smoker and the far side of the coach except the aisle, is there?

A. That is all.

Q. I will make that come out a little further. Now where were you in that aisle?

A. I was right in that head end inside the door and started around the aisle.

Q. You were inside of the door.

[fol. 119] A. No, I wasn't in the smoker, I was in the coach.

Q. You had passed the smoker?

A. You see that smoker don't run right up against the end of the car there.

Q. But you had passed the smoker coming on toward the rear.

A. No, sir, I had just come into the coach.

Q. Now when you heard this thing pass you there, there were some people standing so you couldn't see; where were they?

A. Standing right in that little door so I couldn't come around the smoker.

Q. Around this way?

A. Yes, sir.

Q. You could have turned out back here at the platform?
A. No, it was done by here.
Q. Sir?
A. I say it had done got by here. I was trying to get around where I could see it as it went by.
Q. What kind of platform do you have, enclosed platforms?
A. Yes, sir, vestibule platform, you have got to lift them up and open them before you can do any good seeing out.
Q. Had your flagman by that time you had seen your flagman I believe you told me?
A. I had done give him the order.
[fol. 120] Q. Sir?
A. Had done give him the order.
Q. Do you know where he had gone?
A. No, sir, he went up towards the front end of the car.
Q. Your flagman went up towards the front end of the car.
A. Yes, sir, I met him and give him the order, and he went towards the front end, but where he went to I don't know.
Q. From that time, the time you gave him the order, until this collision, you didn't see your porter or flagman at all?
A. No, sir.
Q. And you kept on taking up tickets until the actual collision occurred?

(No answer.)

Q. Now how long does it how long after you left the union station, I will put it this way, how long after you left the Charlotte pike crossing, was it before the collision occurred?
A. I don't know, sir, I don't know what time I passed the Charlotte pike crossing, I didn't look at my watch.
A. I am not trying to get the time of day, but approximately the length of time which elapsed, your train does not begin to make real speed until she gets out on the single track?
[fol. 121] A. Not so much speed, that shop grade is very heavy and you put seven or eight cars on the engine and it can't make very much speed up there.
Q. And you really don't get very good speed until after you get out on the single track?
A. After you get straight down the Dutchman's grade, they call it.
Q. When the accident occurred, had you got on the Dutchman's grade?
A. Had done got off of it, down at the foot of it.
Q. How far the other side of the shops does the Dutchman's grade start?
A. I think it is about half way between the four and five mile post, the foot of the grade.
Q. Well, while you didn't time yourself and you didn't look at your watch, you do know that from the time the train passed the

Charlotte pike crossing to the time of the collision occurred that several minutes elapsed?

A. Yes, sir.

Cross-examination.

By Mr. Walker:

Q. Mr. Eubank, what is your age?

A. My age? Fifty seven.

Q. How long have you been employed by the N. C. & St. L. Ry.?

A. About thirty seven or eight years.

[fol. 122] Q. You started in with them here at Nashville, did you?

A. Yes, sir.

Q. In what capacity?

A. Well I started in as a brakeman.

Q. How long were you a brakeman?

A. Seven years I believe it was all told.

Q. Brake on freight trains?

A. Yes, sir.

Q. After you ceased to be a brakeman what did you do?

A. I ran a train.

Q. You started in as conductor then?

A. Yes, sir.

Q. Freight conductor.

A. A freight conductor.

Q. And how long were you a freight conductor?

A. I run a freight until 1905, I believe it was, before I was promoted to passenger.

Q. And in 1905 you became a passenger conductor?

A. Yes, sir.

Q. How long had you been a conductor on this train that ran from Nashville to Hickman, Kentucky?

A. Something like three years I think, I can't say positive on that.

Q. How long had Mr. Kennedy been an engineer on this train that he was pulling the morning that he met his death?

[fol. 123] A. Something like the same time, he was away from me a little while.

Q. You and Mr. Kennedy then ran together, did you?

A. Yes, sir.

Q. You were conductor of and he was engineer on train known as number four?

A. Yes, sir.

Q. And you had Meadors as your fireman and a negro porter and Sinclair as your flagman; do you know where Sinclair is?

A. No, sir.

Q. Do you know whether he is in the employ of the company or not?

A. I do not.

Q. He was injured some in the wreck was he not?

A. I couldn't tell you he was down there at the office about a week after that, I saw him, was the only time I have seen him, the only two times I have seen him in his life.

Q. This negro porter, George Ward, was killed?

A. Yes, sir.

Q. And Mr. Kennedy the engineer, and Mr. Meadors, the fireman both were killed on Number four?

A. Yes, sir.

Q. You were due to leave on train number four from the Union Station headed in the direction of Hickman, Kentucky, at what, [fol. 124] seven o'clock in the morning?

A. Yes, sir.

Q. Now this train with which you collided, with which number four collided, which was known as train number one?

A. Yes, sir.

Q. That was a train that ran from Memphis to Nashville, Tennessee?

A. Yes, sir.

Q. Now you had an engine, tender, mail car, baggage car and five passenger coaches?

A. The mail car and baggage car was together.

Q. Combination car?

A. Steel car.

Q. So you had five passenger coaches, a mail and baggage car combined, making six cars, a tender and an engine?

A. Yes, sir.

Q. Now train number four that you were pulling, was a train that stopped at all flag stations?

A. Well it didn't stop at all flag stations unless it had some one to get off.

Q. It wasn't what you call a through train?

A. No, sir, it was a local.

Q. In railroad parlance it is known as a local?

A. You see what we call a flag station in that work is maybe a road crossing.

Q. At any rate, it was what is known as a local train?

[fol. 125] A. A local train, and it stopped at nearly every station.

Q. Train number one running from Memphis to Nashville was what was called a through train or a fast train?

A. A through train from Dickson, nor a through train.

Q. A through train from Dickson?

A. When they didn't make any stops unless it was special orders.

Q. In other words Dickson, Tennessee, to town, about forty miles distant from Nashville, was the last stop you made prior to your arrival at the Union Station?

A. Unless some freight train happened to block it.

Q. The only regular stop?

A. Yes, sir.

Q. That train had an engine, tender and about eight or nine cars?

A. I don't know how many it had.

Q. They had two or three sleepers?

A. They hauled three sleepers.

Q. Now there is what is known as a superior train and an inferior train, is there not?

A. Yes, sir.

Q. Train n*mu*ber one was called a superior train, is that right?

A. Yes sir.

Q. Train number four was an inferior train, is that right?

[fol. 126] A. Yes, sir.

Q. Your train was called the north bound train, is that right?

A. Yes, sir.

Q. Train number one was a southbound train?

A. Yes, sir.

Q. Now being a superior train and being a south bound train, what rights did number one have over number four with reference to the right to travel on a single track ahead of number four, an inferior train?

A. Absolutely.

Q. In other words number one had the right of way?

A. Yes, sir.

Q. Being a superior train, and being a southbound train having the direction. The last time you saw Mr. Kennedy alive was in the union station just about the time train number four pulled out?

A. Yes, sir.

Q. Now that morning you got down to the union station a few minutes before seven o'clock?

A. Always, yes, sir.

Q. Train number four was due to leave at seven A. M.?

A. Yes, sir.

Q. Train number one when on time was due to arrive in the union station in Nashville at seven ten A. M. or ten minutes after you left?

[fol. 127] A. Yes, sir.

Q. Now you said something on direct examination about that you would pass it sometimes at the Union State-, pass number one at the Union Station?

A. I said it had done that.

Q. That was when they had the block to do that?

A. Yes, sir, that was when they run on a block system.

Q. When you left the Union station headed for Hollow Rock, or Hickman, Kentucky, at that time you first passed a tower where a block sheet was kept about a hundred yards north of the Union Station, or what was commonly called, the Broadstreet tower, didn't you?

A. Yes, sir.

Q. And after you passed the Broad Street tower headed in the direction of Hollow Rock, the next tower you passed was Cedar Street?

A. Yes, sir.

Q. How far is it from the block at Broad Street to Cedar Street?

A. How far is it?

Q. Yes?

A. Well, I don't know, Captain, it is nearly two blocks down there.

Q. At any rate, I will pass from that, at any rate after you passed Cedar Street, the next tower house you passed going in the direction of Hollow Rock, is 11th Avenue, is that right?

[fol. 128] A. Somewhere over there, I don't know where it is exactly.

Q. It is known as the 11th Avenue tower?

A. Yes, sir.

Q. And after you pass the 11th street tower, you pass Bostick Street tower, is that right?

A. Yes, sir.

Q. Now the next tower you pass is out at the shops?

A. Yes, sir.

Q. What track number did train number four pull out on from the Union Station?

A. West bound track on the east side of the station.

Q. What number was that, forty?

A. Number—I believe it is track number three.

Q. That was the track it pulled out on every other morning?

A. Yes, sir.

Q. What track did Number one come in on every morning?

A. I couldn't tell you, Captain, it come in on the west side of the shed over there on the far side, I couldn't tell you what track it run in on.

Q. There was a double track leading from the Union Station out as far as the shops, or just a little beyond?

A. Yes, sir.

Q. After you get past the shops that double track ends and then there is a single track on to Harding?

[fol. 129] A. Yes, sir.

Q. And when you get to Harding there is a switch there where trains can pass? Is that right?

A. Yes, sir.

Q. Now on the morning that you left with Mr. Kennedy, you were given these orders a copy of which was read to you for train number four, engine 282 hold main track meet number seven engine 215 at Harding. Now that meant, did it not, that when you passed number seven at Harding, that you would hold the main track and that you would pass him at Harding?

A. Meet number seven at Harding.

Q. And it meant that number seven had engine 215 that is the way for you to identify number seven when you got to Harding?

A. Yes, sir.

Q. Now it says further number one has engine 281, that meant that train number one that was coming in from Memphis to Nashville in the Union Station, on the front end of its engine against a black background in big brass letters were the figures 281, is that right?

A. Yes, sir.

Q. What size are those letters on an engine, I mean those figures?

A. They are good big figures, I couldn't say what size they were, you have got to get the mechanic.

Q. Eight or ten inches high?

[fol. 130] A. I expect something like ten maybe.

Q. Ten inches high?

A. I would expect so.

Q. And they are yellow or brass color.

A. Yes, sir, they are brass color.

Q. And they are right on the front end of the engine; and then up on the headlight in smaller numbers, the engine number is painted there in black letters, is that right?

A. Yes, sir.

Q. And right back of the sand box——

A. You will find a number.

Q. Now, Mr. Kennedy had got a copy of these orders?

A. Yes, sir.

Q. That meant, did it not, unless he had passed train number one between the Union Station and shops where this double track ended, that at that point he must stop, didn't it?

Mr. Norvell: I want to object to that, if Your Honor please, did your Honor catch Mr. Walker's question. The order speaks for itself he has proven superior and inferior trains, I do not object to that.

The Court: Yes, sir.

Mr. Walker:

[fol. 131] Q. Well under operating conditions as they were on that morning, when an engineer had failed who was on an inferior train to meet a superior train that was then due, when he got to the end of the double track, what was the thing for him to do?

A. Stop.

Mr. Norvell: Well now wait a minute, I want to object to that, may it please the Court, unless he qualifies I take it, it is limited to the rule of what he would known as an engineer.

The Court: Well he can ask him, of course he would have to have knowledge of what the custom was, what would be brought about under certain circumstances.

Mr. Norvell: Well, Mr. Walker has some rules.

Mr. Walker:

Q. I will ask you this question then. In the same book of rules that Mr. Norvell handed you, and you were asked about, if this rules doesn't appear, rule 83:

"A train must not leave its initial station on any division or a junction, or pass from double to single track, until it has been ascer-[fol. 132] tained whether all trains due, which are superior or of the same class, have arrived or left. Conductors and engine men must consult train registers. A train must not leave its initial station on any division without a clearance card form A."

That is rule 83?

A. Yes, sir.

Q. That is the rule under which you and Mr. Kennedy were operating?

A. Yes, sir.

Q. Rule eighty-five provides this, does it not?

"when a train of one schedule is on the time of another schedule of the same class in the same direction, it must proceed on its own schedule, except that a train schedule to be passed by another of the same class must not go beyond the passing point in advance of the train which is to pass it, unless directed by train order so to do."

That is Rule 85, isn't it?

A. Yes, sir.

Q. Rule 87 provides this, does it not?

"Inferior trains—such as number four—must keep out of the way of superior trains."

Mr. Norvell: I understand reading the rule in the record does not apply to number four.

Mr. Walker:

[fol. 133] Q. Number four was an inferior train, as I understand you?

A. Yes, sir.

Q. Number one was a superior train?

A. Yes, sir.

Q. Now then in that connection, I want to read you what purports to be rule 87 into the record.

"Inferior trains must keep out of the way of superior trains in the opposite direction, clearing their time as required by rule and in meeting them must, when practicable, pull into the siding at the nearest end. If necessary to pass this point to pull in or back in, the train must be protected as prescribed by rule 99, unless otherwise provided.

Now that is rule 87, is it not, Mr. Eubank?

A. Yes, sir.

Q. Or part of it. When you left the Union Station that morning, did you know whether or not Mr. Kennedy had a copy of the order that I have read to you placed in his hands and whether or not he read it?

A. Yes, sir, he read the order right there in the office.

Q. To whom did he read it?

A. He read it before me and the operator.

Q. Mr. Oden, the operator?

[fol. 134] A. Yes, sir.

Q. You had a copy of the order?

A. And I read mine back and he read his.

Q. You checked it up. I believe you say just as soon as your train pulled out, you started taking up tickets.

A. Just as soon as I read the train order to the porter.

Q. What kind of crowd did you have on the train that morning?

A. Well, I never did get through. What part of the train I had been through there was a pretty good bunch I think a pretty good crowd.

Q. The coaches were all full as far as you know.

A. Yes, sir.

Q. Had a good crowd and you were about five minutes late in leaving?

A. I think so, about five minutes.

Q. You knew and other members of the train crew knew, of course, knew that number one had not arrived at the time you left?

A. Yes sir.

Q. Now you were asked on direct examination about passing something at about the Charlotte Pike bridge; do you know whether that was a train or whether it was just a switch engine backing along there?

A. No, I couldn't tell you, just the noise of steam was what I [fol. 135] was going by, just the noise.

Q. When you ran there to look, you didn't see anything? What is your best judgment about what it was?

A. Well I couldn't say what it was, Captain, whether it was a switch engine, or an engine with a car rolling down there, steam was what attracted my attention.

Q. And it was on the same track that number one was due to come in on?

A. Yes, sir.

Q. Now, Mr. Eubank, you stated on direct examination that when that, whatever it was, passed *you had gotten by* when you got on by the shops you naturally thought it was number one?

A. Yes, sir.

Q. That you had passed back there at the Charlotte Pike?

A. Yes, sir. I placed confidence in Mr. Kennedy that he was looking out for number one and that was it too.

Q. You were in the train with your view shut off from an approaching train such as number one, so that necessarily you could not see the engine number, could you?

A. Not unless I had stopped my work and opened up the platform and got out where I could see.

Q. And if you were looking for number one and had to identify number one as having engine 281, you couldn't take up tickets, could you?

[fol. 136] A. No, sir.

Q. You couldn't perform or attend to any other duties on your train, could you?

A. No, sir, not between here and the——

Q. Now previous to July 9, 1918, the day on which this wreck occurred, state whether or not you had failed between Nashville and

nearby stations to get through your train in time to take up all the tickets and whether or not people would get off and take the tickets with them?

A. Well, I couldn't say for sure, but I failed to get through my train between here and Bellview the first regular stop.

Q. And do you know whether or not people had been bringing back tickets and asking the company to redeem them?

A. I suppose they had, there was an order on the bulletin board that they had.

Q. Now with that in mind while you were taking up tickets just as soon as you could?

Mr. Norvell: I object to that as incompetent.

The Court: Overrule the objection.

Mr. Norvell: I will make a motion to exclude.

Mr. Walker:

[fol. 137] Q. Now, with that in mind, Mr. Eubank, state whether or not you went to Mr. Kennedy previous to that time and had an understanding with him about whether or not he would look out and ascertain whether number one had always arrived or had not arrived?

Mr. Norvell: Now may it please the Court——

Mr. Walker: Before you passed the shops?

Mr. Norvell: I wasn't to except to this line of testimony on this ground. Mr. Walker has kindly produced this rule book. Now in this rule book, section 211A the first sentence, "Operators must furnish conductors and engine men a clearance card form A with all train orders. Rule 204, Train orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Rule Number 105 conductor has charge of his train and all persons employed thereon,—except when his instructions conflict with the rules or involve risk, in either of which case the engine man will be held responsible.

Now, I want to object to that on this ground, that the rules lay a duty alike upon the conductor and the engineer, and the railroad in defending this suit cannot contradict its own rules and escape [fol. 138] liability by a mode of understanding or a mode of habitual violation of the rules, or anything else, that is the point of my objection, because under this act, it is not a question whether any particular man was negligent or not, and whether Mr. Kennedy was negligent, whether his negligence was the sole cause of the injury, and I except for that reason.

The Court: I will let him answer the question under your exception.

To which action of the Court the plaintiff then and there duly excepted.

Mr. Walker:

Q. I was asking you, Mr. Eubanks, when exception was made to the question, if with the question in mind about you being in a place where you couldn't see train number one or its engine number, and while you were engaged in taking up tickets between the Union Station and Shops, where the double track ended, whether or not previous to that time and at the time, you had an understanding with Mr. Kennedy who was on the front end of the engine pulling number four, as to whether he would look out and ascertain the arrival of train number one?

A. Well on this morning when we read the orders and come out of the office I made the remark to him, I said, Uncle Dave, number one must be late or number seven, that is what I said, they have [fol. 139] changed our meeting point.

Q. Now previous to that time——

A. —come down the steps and he would call my attention to the crowds coming down the steps filling up the train and he would say, look yonder at that crowd. I says, Uncle Dave, you will have to look out for me this morning. I will have my hands full.

Q. How many times had that happened, time and time again, hadn't it.

A. I couldn't inform you how many times.

Q. Were you or not expecting him to look out and ascertain whether or not train number one had arrived and identified it?

A. Yes, sir, I was depending on him and the porter and the flagman and the fireman. Three old members of the crew, that was where I put my dependence.

Q. Now, Mr. Eubank, at the place where you passed this something you termed it, whatever it was, whether it was a train or whether it was a switch engine, at or near the Charlotte Pike, is it on a curve or a straught away at that time?

A. It is on a straight there, because he run right under the bridge as soon as the noise went by me.

Q. What opportunity did the engineer on train number four — to ascertain at that time and at the place where you passed this something, whether a train or an engine, to ascertain and find out what engine number or train or the engine or whatever it was, had, [fol. 140] whether there was anything to obstruct his view at that point?

A. I don't think so. I wasn't out there to see.

Mr. Norvell: I asked the same question about what could be seen from the engine and he stated he had never been on the engine and couldn't say, and you will have to prove that by one who has been in that position.

Mr. Walker:

Q. I will ask you this then; the track at that point runs straight, doesn't it?

A. Yes, sir, right below the bridge it is straight.

Q. The engine follows the track and the rails, don't it?
A. Ought to, if it don't you will be in a mighty bad shape.
Q. That is right, the engine stays on the rails; the engineer sits in the cab on the lookout right straight ahead?
A. Yes, sir.
Q. He can look ahead.
A. Yes, sir.
Q. From the adjoining track on which train number four was running, right down in the direction from which train number four was coming, didn't he?
A. Yes, sir.
Q. The engine or whatever it was on the track adjoining that [fol. 141] on which number four was running following the line of the track right straight down wasn't it?
A. I suppose so, I don't see how else it could come.
Q. Was there anything else between the engine that was pulling number four and this other engine or whatever it was, to obstruct the view?
A. Nothing that I know of, I couldn't say, but I don't see how there could be anything unless one of the engines had hit it and knocked it out of the way.
Q. Now while you were back there in the coach taking up tickets, you have your back in the direction in which your train is going?
A. Yes, sir.
Q. So that anything passing you in an opposite direction why it goes by you before you even know it is there, don't it?
A. I can't see it approaching me at all.
Q. What were you doing when this wreck occur-ed?
A. Reaching over next to the window for a ticket.
Q. You were not hurt?
A. Well not to say hurt, a suit case run up against my shin down there, that was all.
Q. Yes?
A. When I was reaching over for the ticket the brakes applied and kind of run me backwards and I kind of grabbed to the seat and it was all done that quick.
[fol. 142] Q. You said something on direct examination about the point where these trains collided being on a curve as I understood you to say, is that right?
A. Yes, sir.
Q. You said that the curve went to the right?
A. Went to the right of our train.
Q. Now train number four, or your train, was going in the direction of Hollow Rock?
A. Yes, sir.
Q. And this curve curved to the right, going in the direction of Hollow Rock?
A. Yes, sir.
Q. Now there is just a single track at that point, of course?
A. Yes, sir.

Q. The engineer sits on the right hand side of his train, doesn't he?

A. Yes, sir.

Q. His engine, Mr. Kennehy being engineer on train number four, on engine 282, he would be on the inside of that curve, wouldn't he?

A. Yes, sir.

Q. And he could see across and see all the way down?

A. I don't know how far he could see, Captain, on an engine, I can't say for that, for you can stand down on the ground making it lower, you can see down to that viaduct, the viaduct must obstruct the view.

[fol. 143] Q. Now the engineer on train number one, when he was coming around that curve, being on the right hand side, he would be on the blind side of the curve, be on the outside of the curve.

A. Yes, sir.

Q. So the boiler would obstruct his view. You said something about the viaduct, you don't know whether or not that might obstruct the view of the engineer I show you a photograph here that has the figure number five in words written on it, "view of track and overhead bridge approached from direction train number one was traveling," and ask you to state whether or not that correctly represents the situation out there?

A. What part of the track is this, west of the viaduct, isn't it?

Q. That picture says it is taken from the direction that train number one was coming. In other words it is looking back to Nashville?

A. That is what I say, that don't show much. Here is where we hit, back in there.

Q. Back where that steam is.

A. Yes, sir.

Mr. Norvell: You could mark that with a pencil.

Mr. Walker: I identified it by saying where that steam is, that is white.

[fol. 144] Q. You are pointing your finger where there is some white stuff that looks like steam?

A. Yes, sir, that don't show that little cut over there at all.

Q. There was a horrible wreck when the trains came together.

A. That was what I say.

Q. The engines were torn all to pieces?

A. Yes, sir.

Q. Some of the cars were telescoped?

A. Yes, sir.

Q. The equipment practically destroyed except the three or four coaches?

A. Number one's train wasn't tore up so bad, I don't think, after they passed the baggage car—yes there was two laborers' cars in front of the baggage car.

Q. And the first three coaches on your train were just demolished?

A. Well I don't know whether that steel car was totally demolished or not.

Q. Anyway they were telescoped?

A. The express car in my train telescoped the smoker.

Q. The track was torn up, wasn't it?

A. They usually are.

Q. It was too.

[fol. 145] A. I couldn't tell you, I didn't look at such as that, there were other things I wanted to look at.

Q. Now, Mr. Eubanks, I wish you would look at a picture that has got the figure number four, which says there, "view of cars after being drawn apart, showing baggage car and first coach of train number four, telescoped." Do you remember something like that.

Mr. Norvell: You ask the witness to identify figures, you will get it mixed.

A. Yes, that looks very much like where the ladies car was coupled, and they uncoupled it and pulled it back.

Mr. Walker:

Q. I will ask you to file these pictures which are figures five and four, respectively, as exhibits one and two to your testimony. Now I show you a picture that has figure number two with these words on it: "view of destroyed equipment," and ask you to state whether or not that correctly represents part of the situation after the wreck?

A. That is number one train I suppose from the looks of it, I never did look at that side of the wreck but very little.

Q. That was the general situation from the way this picture shows?

[fol. 146] A. Yes, sir, from the looks of the end of the car there.

Q. Then I show on the reverse side of this paper containing figure number two, two pictures with the figure three written on it. with the words, "Boilers or locomotices 281 at top, 282 bottom," and ask you to state whether or not the top picture is the boiler of engine 281 on train number one and the bottom picture is that of the boiler of 282 on train number four?

A. That represents the boilers pretty well.

Q. I will ask you to file this figure number two as exhibit number three to your testimony, and figure number three on the reverse side with these two boilers appearing in the picture, as exhibit number four.

Court thereupon adjourned until tomorrow morning, October 22, 1920, at nine o'clock.

[fol. 147] October 22, 1921.

Examination continued by Mr. Walker of Mr. Eubanks:

Q. Mr. Eubanks this order that was given to you, a copy of which you say was given to Mr. Kennedy, the engineer was what is known in the rule book among railroad men as order form 19?

A. Yes, sir.

Q. I want to ask you to file this order, form 19 in its original form, as Exhibit 5, to your testimony?

A. I will.

[fol. 148] See Insertion Page 101.

[fol. 149] Q. This book of Rules that I show you, this is the same book or one exactly like it about which you were interrogated on yesterday by Mr. Norvell and myself, is it not?

A. Yes, sir.

Q. I will ask you to file that as Exhibit No. 6 to your testimony?

A. I will.

Q. Now in what way did the engineer have to identify train No. 1.

A. By the engine number given in the order.

Q. By the engine number?

A. Yes, sir.

Q. Prior to July 9th, 1918, the morning of this wreck, state whether or not many times previous that similar orders have been given to you and to Mr. Kennedy, the engineer, with reference to the meeting point of No. 1.

A. Well, I can't remember, Mr. Walker, about how many orders we would get about No. 1.

Q. Previous to July 9th?

A. That is what I say.

Q. Hadn't you been given orders about the engine number that No. 1 had?

A. Some mornings we would get an order about No. 1, and nearly every morning we got an order about No. 7.

Q. About where to meet No. 7?

A. Yes, sir, every other morning, not every morning.

[fol. 150] By Mr. Norvell: I am objecting right now, until they go further.

By Mr. Walker: We have got the orders. I will withdraw that.

Q. When your train was on time, No. 4 was on time and No. 1 was on time between what points would train No. 4 pass train No. 1.

A. Well, you could say anywhere from the terminal depot to the shops, somewhere in there.

Q. In other words, if train No. 1 was on time which was due to arrive at the station at seven ten A. M. and train No. 4 was on time, that was due to leave the station at seven A. M. those respective trains would pass each other between the Union Station and the Shops the point where the double track ends.

A. Yes, sir, on that time.

Q. Train No. 4, when on time arrived at the shops at 7:08, did it not?

A. I think that is the time there, yes, sir.

Q. In other words, it took train No. 4 eight minutes to go from the Union Station to the shops.

A. Yes, sir.

Q. Now what was the rule and custom with reference to whether or not if train No. 4 had not passed train No. 1 between the Union [fol. 151] Station and Shops, as to where No. 4 was to go, either to go past Shops or stop there?

A. We stop there.

Q. Did you or any other member of the train crew have any train order with reference to No. 1 other than the one that you have testified about?

A. The engineer had a copy of it and the flagman had my copy.

Q. I say, did you have any other order about No. 1 other than that?

A. No, sir, no other order but them two copies.

Q. Now in case you failed to pass No. 1 between Union Station and Shops, in order to get by the Shops what was necessary to have done?

A. *Sopt* and go to the Shop and see will they give you another order against No. 1.

Q. From whom would you get the order.

A. We would get the operator to get it from the train dispatcher.

Q. Mr. Eubanks, the engineer and fireman who were in charge of engine No. 281 that was pulling No. 1, were killed, were they not?

A. Yes, sir.

Redirect examination.

By Mr. Norvell:

Q. Mr. Eubanks, Mr. Walker asked you about stopping at other [fol. 152] times in the past and getting orders at the shops against No. 1, that is the tower at the Shops?

A. Yes, sir.

Q. The operator?

A. Yes, sir.

Q. I will ask you whether or not in those other instances when you had stopped at the Shops the signal arm there, was that clear?

A. I can't tell you that morning.

Q. Sir?

A. I can't tell you anything about it that morning.

Q. I am not asking you about that morning, I am asking you about the other times when you stopped, when the signal arm is up that is a clear track?

A. Yes, sir, supposed to be.

Q. What does it mean when it is down?

A. That is a stop signal.

Q. I will ask you whether or not on a previous morning when No. 1 was late and your train had stopped at the tower and you and the engineer had gotten other orders against No. 1, if those instances the stop signal hadn't been there?

A. Yes, sir, it was standing against us, when I would go over after orders.

Q. Of course, on this particular morning you were in your train [fol. 153] and you couldn't see what the signal was and those other mornings you got out to get your orders and could see?

A. Whenever the train would come to a stop I would quit my work and got to see what the delay would be.

Q. Now, Mr. Eubanks, we were on these rules yesterday and Mr. Walker has put the whole book in, but just so as to explain this question, I will ask you whether or not Rule No. 253 whether Rule No. 253, you will find it at the tope of that page your right hand is on, does not state that trains must be identified by the men in charge except when a train register or other circumstances gives such positive evidence of their arrival as to leave no doubt whatever, and then the balance of the rule. That is a correct statement of the first sentence of that rule, isn't it?

A. Yes, sir.

Q. Now, Mr. Eubanks, was there any register at the shops?

A. How is that?

Q. Was there or not a register at the shops at that time?

A. Yes, sir, the operator keeps a record of every train that passes there and engine.

Q. At that time?

A. At that time the operator has a sheet before him there on the table.

[fol. 154] Q. Now what does that rule mean about the train register, does that mean a sheet that the operator would keep, or does it mean in addition thereto a stopping point where the conductor or engineer or both have to stop their trains and see whether another train has passed and examine the register and sign it. In other words, to make myself clear, when you leave Nashville, there is a train register here?

A. Yes, sir.

Q. You examine that and you also sign it?

A. How is that?

Q. Don't you sign the train register here at Nashville when you leave?

A. Yes, sir, we register out.

Q. And that shows what other trains have come in or left prior to you?

A. That register shows the arrival of a train and the departure.

Q. Now, I say, you have stated what was at the shops, but I say, in addition thereto was it a place where you gentlemen, I mean by you gentlemen, you and the engineer, had to register in or out unless there was a stop signal?

A. At the shops?

Q. Yes?

A. No, sir, we didn't register in and out there.

Q. What you meant was the operator had a sheet showing the passage of trains?

A. Yes, sir, the operator had a sheet showing that.

Q. Now Mr. Eubanks, you were cross examined yesterday after-
[fol. 155] noon about your inability to see this train or engine as it

was passing, before you got to the Charlotte Pike crossing had any other switch engine or train passed in the yards.

A. None that I know of.

Q. Nothing very close?

A. No, sir, nothing that called my attention. They might have been several tracks off but I never noticed them.

Q. Mr. Eubanks, you were talking about these people, I understood you to say yesterday you had just come around the smoker and were getting into the main aisle of the car——

A. No, sir.

Q. Let's get it right?

A. I had just come in the door.

Q. You had just come in the door right here?

A. Yes, sir.

Q. You said something to Mr. Walker about fixing to take up a ticket, that confused me, what did you say you were fixing to do there?

A. I was taking tickets out of that smoker, reaching in after them.

Q. The smoker door——

A. Some is one way and some the other, they are not all built alike.

Q. I am asking you about this smoker door?

A. The smoker door was right opposite the door as well as I [fol. 156] remember, the coach door, as I came in.

Q. In other words, isn't what you call the smoker door, instead of opening into the aisle lengthwise as some of them do, opened opposite the door of the coach?

A. Yes, sir.

Q. You were reaching in?

A. I reached in there for a ticket and I hea-d something coming and I started around where I could see out of the side.

Q. In that smoker there were windows opening out?

A. Yes, sir, there were windows over there.

Q. One window or two windows probably.

A. I think there is two, I ain't sure.

Q. One opposite each side, is that correct?

A. Passengers usually fills them up until you can't see a window hardly in the smoker.

Q. That is, people that are standing in the smoker that is what you mean?

A. They are standing and sitting both in there.

Q. You say what interfered with your view in the smoker people were standing in there?

A. Yes, sir.

Q. Now your flagman had been through the train and saw that it was crowded, hadn't he?

A. I don't know sir, I guess he had. He came from the rear end, he ought to have saw it.

Q. You told me yesterday he came from the rear end and met you up there?

[fol. 157] A. I say, he came from the rear end and came forward.

Q. When did you give him that train order?

A. It was our ruling to show the train order to the flagman and hand it to him.

Q. Mr. Eubanks, state whether or not, particularly when your train is crowded so that the conductor might be a little extra busy, if it is not the custom for the flagman to do any looking out for the conductor for passing trains and so forth?

A. Well, the flagman looks out——

Objected to by defendants as immaterial under the allegations of the declaration.

Overruled and defendants excepted.

Q. Sir?

A. I say, the flagman looks out at stations so as to get the passengers off and get them on.

Q. And just as you stated on yesterday, the engineer gets his order and shows that to the fireman, and under your rule the other party to whom that order is addressed, namely the conductor, gives his copy or shows it to the flagman, under the rule, doesn't he?

A. Yes, sir.

Q. And the flagman is there to assist the conductor?

A. Yes, sir.

Q. In seeing that the orders are carried out and making a report to him, isn't that correct?

[fol. 158] A. No, they don't always make a report to the conductor.

Q. I understand they don't always, didn't in this case, I am asking you now isn't it part of his duty when you give him that train order——

Objected to because the rule is the best evidence.

Objection sustained.

Mr. Norvell: I am coming to the custom and the custom establishes the rule.

Mr. Walker: In view of the declaration the defendants except as immaterial.

Objection overruled and defendants excepted.

Mr. Norvell:

Q. Reforming my question, Mr. Eubanks, isn't it the custom and particularly, I will say, when the train is crowded so that the conductor has extra ardious duties, for the flagman to be on the lookout for the passage of trains and other things to see that the train orders are observed?

A. I think it is the custom for us all to look out when we are crowded that way, for any member of the crew.

Q. I understand, you have covered the engineer, I am not talk-

[fol. 159] ing to you about that——

A. I am talking to you about the facts.

Q. The flagman I suppose will take the order and read it and look out for the safety of the train?

A. He is a member of the crew, of course.

Q. And if I understand you then, it is the custom particularly when the conductor is a little overworked for the flagman and the other members of the crew to be on the lookout for the observation of train orders?

Defendants objected to this method of examination leading his own witness.

Overruled and defendants excepted.

A. Yes, sir, we are all on the lookout for that.

Q. Mr. Eubanks, when you were passing there this other train or engine at or near the Charlotte Pike crossing approximately how fast was your train going?

A. Well, I can't hardly say, Captain, I was busy in my train and didn't pay any attention as to what speed we picked up at all.

Q. You were still, so to speak, in the yards?

A. Yes, sir we were in the yard limits.

Q. To refresh your recollection, Mr. Eubanks, your train hadn't got to a speed of over fifteen or twenty miles an hour when it got to that point?

A. I can't say one way or the other what speed we were running [fol. 160] up that hill, I was busy in my train, sometimes we would get pretty near stopped for the signal to go ahead again, but we usually run something like twenty miles an hour along there.

Q. You have no recollection of going along there on this occasion faster than that?

A. No, sir or no other occasion along there, going up that hill.

Q. Now, Mr. Eubanks, you stated that you showed your order to the porter, there is nothing in the rules about showing it to your porter, is there?

A. I didn't show it to the porter, I read it to him.

Q. There is nothing in the printed rules of your company requiring you to show the order to your porter is there?

A. I don't know as there are.

Q. I pass you the rule book, 211, which shows to whom the orders are to be shown by the engineer and conductor, and see if it says anything about the porter, and see if you recall any other part of the rule book that shows that?

Mr. Walker: I object to that because the rule book shows for itself. I don't think it shows that.

Mr. Norvell:

Q. Now, Mr. Eubanks, it had been your custom to show your [fol. 161] order to your porter, hadn't it, just as you did that morning?

A. I read them to him every morning, yes, sir.

Q. There seems to have been some printed rule requiring that, why did you do that?

A. I suppose he was a member of the crew and I would always notify him what we had to meet and look out for, and if we were going on the side track——

Defendants object to the question and answer because — immaterial.

Overruled and excepted to.

A. The porter's duty was when we met No. 7, and had an order to meet No. 7, and if the order didn't say No. 7 would take the siding, the porter had to go and open the switch and let our train in. Well, if I hadn't told him anything about this when the train would stop what would he do only sit there in the train maybe.

Q. Furthermore, wasn't it your custom, he was a member of the crew, for the porter, particularly when the conductor was overworked, as you said you were that morning——

A. How is that?

Q. I will ask you whether or not it was not the custom, particularly when the conductor was overworked with a big crowd, as you said that morning——

A. Well, Captain——

Q. Wait a minute, let me finish my question. I say was it not the custom, particularly when the conductor was overworked, and [fol. 162] there was a big crowd on the train, as you say there was that morning, for the porter to receive or to see a copy of the train order and to be on the lookout for the passage of trains and other things so that they might be clear?

Objected to as immaterial. Overruled and defendants excepted.

A. It was the custom with me to read the train order to my porter, how it was among the other men I don't know. I didn't know and couldn't tell whether my train was crowded when I read that order to him. I didn't know whether there was a dozen on there.

Q. I didn't mean the reading of the order, Mr. Eubanks you never caught my question. Of course I understand you read it to him every morning.

A. I did read it to him every morning.

Q. Here is the question, if on occasions, particularly when the train was crowded and the conductor was over-worked, not only that you shows him the train order, but wasn't it the custom for the porter also to lookout for passing trains to see that train orders were observed and didn't you depend on him that morning because he was an employe?

A. I depended on the employees all the time to help me lookout for everything, and especially on the front end that way, I expect they to see the number of the train was all, then I go back in the train.

Q. I believe you stated to me *on* yesterday from the time you [fol. 163] passed the Charlotte Pike crossing, rather from the time you gave a copy of the order to the flagman, and from the time you

spoke to the porter about what the orders were, you never saw anything at all anymore?

A. No, sir, I was busy in my train.

Q. I mean thereafter you didn't and for some days after?

A. No, sir, it was three or four days before I ever seen him.

Recross-examination:

Q. You were asked about the train register at the Union Station, now you signed that register and the engineer Mr. Kennedy signed it on this particular morning?

A. Yes, sir.

Q. Now what is the object of signing the train register?

A. Well we sign it out for other classes of trains that wants to go out, or come in, you know, like that, going out especially, freight trains, showing that we didn't have any signals and that we are out of town.

Q. That shows the time you registered out?

A. Yes, sir.

Q. Now there was no train register at the shops, was there?

A. No, sir.

Q. In other words, you didn't have to stop the train at the shops [fol. 164] at that tower and go in and register there?

A. No, sir.

Q. You were asked about this particular morning with reference to the signal at the shops, whether there was a proceed or whether there was a stop signal, you don't know how it was on this particular morning, do you?

A. No, sir.

Q. When the signal arm is standing straight, vertical that means a proceed signal?

A. Yes, sir.

Q. And when it is standing at forty five degrees why that is a stop signal, is that right?

A. Yes, sir.

Q. Now you are governed not by the signals at the shops as to whether to proceed and go by, are you?

A. Well, whenever we went by if I happened to be where I could see the signal, any time before that, it would always be clear.

Q. The point I am asking is this—there was no train register at the shops, was there?

A. No, sir, no train register.

Q. You were governed by the train orders that were given to you and superiority of the trains, weren't you?

A. Yes, sir, that is what we are governed by.

Q. Now assuming that when you left Nashville and you got to [fol. 165] the shops and you saw a proceed signal there, and while you were going with your train order, the position of that signal, if it was at proceed, in view of your train order and the superiority of your trains, that didn't give you any right to go by the shops, did it?

A. No, sir.

Q. In other words, unless the engineer knew that train No. 1 had arrived and had gotten past the shops and had gotten off of the single track, no matter what position the signal at the shops was standing at, he didn't have any right to go by did he, under the rule?

Objected to by plaintiff because that is a question for the jury.

By the Court: I think it is asking this witness to construe the rules of the company I don't see why, under certain circumstances, he shouldn't have the right to do it.

Mr. Walker: In the first place he brought this out about the proceed signal there and I am proving what was the custom and the practice there, in view of the train orders, as to what was the [fol. 166] duty of the Engineer.

Mr. Norvell: Mr. Walker asked that question under the rules, and the rules speak for themselves. This gentleman has testified about the custom but he can't state the conclusions under the custom, that is for the jury. He can state what happened out there.

Objection overruled and plaintiff excepted.

Question read as follows:

Q. In other words, unless the engineer knew that train No. 1 had arrived and had gotten past the shops, and had gotten off of the single track, no matter what position the signal was standing at at the shops, he didn't have the right to go by did he, under the rule?

A. No, sir, he didn't have any right to go by.

Q. Now, Mr. Eubanks, train No. 4 was operated, as I believe you have stated, by train orders and by superiority of trains, is that a fact?

A. Yes, sir.

Q. When the signal was at the proceed position that meant, did it or not, that the switches were lined up for train No. 4 to proceed off of the double track on to the main provided that No. 1 had arrived, or provided further that No. 4 had a train order to go further than the shops?

[fol. 167] Objected to by plaintiff and overruled.

Plaintiff excepted.

A. Yes, sir, we had to have orders to get any further.

Further this Deponent saith not.

[fol. 168] P. J. GEARY, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Byran:

Q. This is Squire P. M. Geary?

A. P. J. Geary.

Q. What business are you in Mr. Geary?
A. Retail shoe merchant.
Q. Connected with what firm?
A. Kuhn, Cooper Geary Company.
Q. Were you acquainted with D. C. Kennedy and his family?
A. Yes, sir.
Q. How long have you known Mr. Kennedy?
A. I have been knowong Mr. Kennedy for over thirty years.
Q. Were you or not intimately acquainted with him?
A. Very intimately acquainted with him.
Q. What business was he engaged in while you knew him?
A. Locomotive railroad engineer.
Q. Mr. Geary tell the Court and the jury what character of man he was in respect to his physical activities.
A. He was a very good man, very active man.
[fol. 169] Q. Was he a fleshy man or a thin spare made man, or how?
A. Well, he wasn't a very fleshy man, I would safely say he was a man that weighed about 160 pounds, along about that, I don't know his exact weight, but he was a medium built man.
Q. What do you know about his habit of exercise, walking or anything like that?
A. Well, he was very active, he would walk,—we have got out, we used to p-ay cards every other night, and he would get out the window and back, and then he would try to play games, such as baseball, at one time he was out there playing baseball.
Q. Was he a baseball enthusiast?
A. Very, he used to go to every game he could go to.
Q. What was the condition of his health, do you know?
A. His health was very good.
Q. How long had you seen him or talked with him before his life was taken in the wreck?
A. Let's see, I think that wreck was on Tuesday morning, I believe it was, I don't know the exact day, but I guess I saw him about, well it was not a week anyhow when I saw him last.
Q. Something like a week before the wreck in which he lost his life?
A. It was not a week, it was less time than a week, you see I never got to see him Saturday night because our store was open.
[fol. 170] Q. Tell of anything you did for him or assisted him in that brought you in personal contact with him?
A. He used to come in the store and transact business. I used to pay up his premium, life insurance for him, and he done several acts of charity, that he would leave money in my possession to give those people, he was a very charitable man.
Q. So that you saw him frequently then?
A. He was in the store, he would be in, every trip he would be in he usually would come to the store.
Q. After this wreck happened the 9th of July, did you visit the wreck?
A. Yes, sir, I went out to see about Mr. Kennedy's affairs.

Q. What time did you get there?

A. I must have got there along about, well when I heard it, it was along about between eight thirty and nine o'clock.

Q. On the morning of the wreck?

A. Yes, sir, on the morning of the wreck.

Q. Was there any search made while you were there for the body of Mr. Kennedy?

A. We were all looking to see what we could do, I was helping to get the people straightened out. I went there to see if I could find Mr. Kennedy, that was my object.

[fol. 171] Q. You assisted to relieve the distress?

A. Yes, sir, I helped in several cases.

Q. While you were there was the body of Mr. Kennedy discovered?

A. Yes, sir, we found it under the machinery, under the wheel.

Q. Did you see him?

A. Yes, sir.

Q. Did you recognize him?

A. The features were so bad we couldn't recognize the features, until we taken him out and found his letters and his pocket- and his watch.

Q. Who acquainted his family, his wife, of his death, who was it did that, notified his wife?

A. I did, I was the one that told his wife.

Q. Are you well acquainted with Mrs. Kennedy.

A. Very much, I have been knowing Mrs. Kennedy for the same length of time, for thirty years.

Q. What is the condition of her health and has been since the accident?

A. Well, at the time of the accident she had *neverous* trouble because of the wreck.

Objected to as immaterial.

Q. Was she ill after the accident?

A. After the accident she was ill for some time, but her health at present is some better.

Q. Her health at present is better.

[fol. 172] A. Yes, sir.

Q. Mr. Geary, recurring to Mr. Kennedy's health and activity, how did he compare with other men ordinarily of the same age?

A. Well, I would consider he would be a more active man than other people at his age. I can compare his age with my father in law, they were about the same age, and my father in law was a very disabled man, and wasn't able to go and Mr. Kennedy was.

Q. In other words, he was an unusually active man for his age?

A. Yes, sir, very much.

Q. Was he active mentally as well as physically?

A. Yes, sir.

Cross-examination.

By Mr. Walker:

Q. Do you know how long Mr. Kennedy had been drawing a pension Mr. Geary?
A. You mean from the Government?
Q. Yes.
A. No, sir, we used to cash his pension checks for him, I guess he must have been drawing it for quite a while.
Q. How long?
A. I have been in business about fifteen years, and I have cashed them possibly about that length of time for him.
[fol. 173] Q. He has been drawing a pension for as long as fifteen years then?
A. Between twelve and fifteen years.

Further this deponent saith not.

[fol. 174] C. B. GLENN, called for the Plaintiff, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. Mr. Glenn, you are paymaster of the N. & C.
A. Yes, sir.
Q. And you also had charge of the payrolls during the operations in the war?
A. Yes, sir.
Q. Mr. Glenn, have you made up from your records a statement showing the earnings of the deceased, D. C. Kennedy from the road, or the operating authorities of the road for the last ten years?
A. Yes, sir, that is ten years prior to his death.
Q. Will you kindly produce that statement?
A. I will.

(Statement produced.)

Q. What did he earn in June 1918, that is, the month before his death?
A. We haven't 1918, he died, as I understand January 1918, that is what Mr. Hall told me and I did not figure 1918, he told me January 1918. I have got down to December 1917, inclusive. I could have made it, but that is the reason I didn't make it. I could have made it without very much trouble.
Q. What did he earn December 1917?
A. $2,782.25.
[fol. 175] Q. Sir?
A. Oh, in December. That is the total for the year, $253.30.

Q. In November?
A. $253.60.
Q. In October ?
A. $252.
Q. Now, Mr. Glenn, the paper you have in your hand shows his wages from the railroad or operating authorities of the railroad for the ten years preceding January 1st, 1918?
A. Yes, sir.
Q. That is a true and correct excerpt from your records?
A. Yes, sir.

Mr. Norvell: I presume you gentlemen will waive the production of the records.
Mr. Walker: Yes, sir.

Q. Will you kindly file that as Exhibit No. 1 to your testimony?
A. I will.

[fol. 176] (See Insertion on Page 125.)

[fol. 177] Q. Mr. Glenn, if it is agreeable to counsel on the other side, I don't want to bother you unnecessarily, I would like for you to prepare a statement showing the earnings of Mr. Kennedy, from January 1st, 1918, to July 9th, 1918.
A. I can't give you to July 9th, we only go by months. The payroll only shows from month to month.
Q. Say then through July, as a matter of fact he died July 9th, 1918, we will say then from January 1st, 1918, to August 1st, 1918.

Mr. Walker: July 1st, he died July 9th.
Mr. Norvell: Didn't they pay him for July?
Mr. Walker: Yes, sir.
Mr. Norvell: Anyway, put it this way, prepare a statement showing how much he earned from month to month from January 1st until he got off your payroll, that will catch it, and then with permission of opposing counsel will you kindly send it up here by a passenger and let it be filed as Exhibit No. 2 to your testimony?
[fol. 178] A. Yes, sir. I can send you that up in a short time.
Mr. Norvell: All right, sir, and with permission of opposing counse-, we won't bother you to come back. You can send it by messenger.

Cross-examination waived.

The statement was received and filed and marked Exhibit No. 2 to the testimony of C. B. Glenn, and is as follows:

Original Exhibit.

[fol. 179] W. G. TEMPLETON, called for the Plaintiff, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. Mr. Templeton in your capacity as Superintendent of the Northwestern Division of the Nashville, Chattanooga & St. Louis Railroad you had served on you a subpœna duces tecum to bring certain records, will you kindly produce the record showing how long Sinclair or St. Clair, as the case may be, the flagman on No. 4 on the morning of July 9th, 1918, had been employed by the road, and then how long on this northwestern run.

A. You want me to read the records or do you want them?

A. Just read the records?

Mr. Walker: I object to that as immaterial how long this man had been in the employ of the railway. It is immaterial. There is no count in the declaration charging negligence against this man.

Mr. Norvell: I can cure that objection I think if that is their ob-[fol. 180] jection. On the cross examination of Eubanks it seemed to be the tendency to show that there was no duty on him at all on account of being busy there with those tickets, there fore I want to ask leave of the Court to amend the declaration so as to allege, may it please the Court, negligence on behalf of the flagman, under those circumstances, in not watching out for and observing whether or not No. 1 had passed and in failing to report to the conductor as the train pulled down that it had not passed, and negligence of the road in allowing the train to become so crowded that the conductor could not perform his duties under the rules in the proper observance and safety of passengers and other employees on the train, and in not substituting the flagman to act in his behalf at that point. I would like to make those two amendments to the declaration. The gentleman comes with the proposition that under this custom and circumstances and so forth, say he could not be expected to comply, I think in that case I am entitled to that amendment on behalf of the flagman, because under the rule the conductor passed his order to the flagman and the engineer to the fireman. Now if the principal upon whom the obligation was laid was so busy, and his train was so crowded, then that threw direct duty on his subordinate. And the road further under such circumstances was negligent in providing this conductor, so engaged that he couldn't perform his duties under [fol. 181] the rule, with a green and inexperienced flagman.

Mr. Walker: I thought we settled this question of amendment when the trial started out. Mr. Eubanks was the plaintiff's witness, and because we developed this custom existing between the engineer and himself as Mr. Eubanks testified, that is no fault of the defendants. They developed that by their own witness. Now he seeks at this late hour to amend the declaration so as to make an allegation of negligence with reference to the flagman. Now we don't know where Sinclair is. He is not in the employ of the company, we

can't get him here at this late hour, and it does look to me at this late hour unfair when we have proceeded with the trial of the case on the theories laid in the declaration without any notice from them that this was going to happen, and without any preparation to meet it, to permit them to amend the declaration.

Mr. Norvell: On this question of unfairness——

[fol. 182] Mr. Walker: I am talking about from my standpoint.

Mr. Norvell: The gentleman is using that in a technical sense. We have both practiced law here for a few years and your Honor knows amendments are liberal. I withdrew my amendment yesterday because under his explanation I realized or thought he should have to send out for experts. May it please the Court, of course this was developed through my witness, but in this case, and it many times happens in cases of this kind, you have to summons the defendant's witnesses to prove your case. There is nothing unfair, nothing wrong about it. It is entirely proper. It is not directly a development of my proof as it would be in some cases. Now there is no contention and there will not be any contention that Mr. Sinclair the flagman approached this conductor to have the train flagged down, and their own man, Eubanks, who has been in their employ for two years or more, since this accident, and who they had a perfect right to talk to and who they have evidently talked to, in view of their [fol. 183] cross examination, and properly did they talk to him they knew that he would testify that the flagman didn't approach him. And now, may it please the Court, we also have looked for Mr. Sinclair. We have been unable to locate Mr. Sinclair, and in examining Mr. Eubanks on the stand yesterday I thought possibly he could locate Mr. Sinclair and saw that he had no information. This is a perfectly proper amendment to this declaration, to fit the declaration to the proof, and under the circumstances, being developed by these parties, they said it is unfair to allege that this flagman was green. Here is the record that has been in their possession. They had notice last term in Judge Langford's court of what the subpœna duces tecum contained. The other allegation is that in a crowded train like this, where they say the conductor couldn't perform his duties, then it was negligence on the part of this flagman in not notifying the conductor, in not looking out and notifying the conductor to flag down the train. Now there is not one iota of proof that this flagman did [fol. 184] notify the conductor, and this man on the stand, Mr. Templeton, who is as much their witness as he is my witness, he is in their employ but I technically subpœnaed him here, would testify that the flagman didn't approach him. I say that this is a fair and proper amendment and is based upon written records in their possession which they are producing, and upon statements of men in their employ here on the stand, and I want to insist upon this it is fa-r.

Mr. Walker: It is not a question of what we had in our possession. It is misleading us. When we went in to try this case we went in to try it on the first, second and third counts of the declaration, now he comes along and undertakes to have a fourth count charging that we were negligent because we had a green flagman, and that the flagman was negligent in not notifying the conductor I suppose to

stop the train. Now they proved by Mr. Eubanks, one of their witnesses that he didn't notify him. We don't know whether he did [fol. 185] or not. We have got some prooof to present in this case as well as the plaintiff. Then in addition to that we haven't got Mr. Sinclair here to show what else he did. We don't know what he did. We don't know what communication he had with the engineer. I take it that the bell cord could be pulled by somebody other than the conductor. We don't know what Mr. Sinclair did about that. We have got no way of ascertaining. We had no right to assume that we would be called upon on a matter like that for the reason that we are trying the case upon the first, second and third counts of the declaration. Now with neither the plaintiff or defendant knowing where this witness is, with neither having the right to anticipate that this question would arise, after both sides announced ready for trial, and after the case had been going along for two days, knowing that we are not able to get this man, they cannot expect us to get him when he is not in our employ. I say it is manifestly unfair at this late date so far as our position is concerned with reference to this witness.

[fol. 186] With reference to this other matter. That happened in 1918, and that goes into the question of shortage of equipment, on account of the powder plant and other things and it develops a great big thing. I say, at this late day, when the plaintiff had an opportunity to make this amendment before the trial, in fact, according to Mr. Norvell they issued a subpœna to have these records brought here at the last term of the court and when they knew at that hour these matters, that with that knowledge that they have had for all these months that certainly they ought not now, after getting us into the trial, to come along and make these amendments.

Mr. Norvell: I would like to make a statement as upon affidavit, I can produce the record to verify it.

Mr. Walker: I wouldn't question anything you said.

Mr. Norvell: Although I allowed you to put in part of the record yesterday, to make a statement as upon affidavit, that by August 16 1918, a complete investigation was made and the authorities of this [fol. 187] road had access to Mr. Sinclair and heard him go into the matter fully and knew just exactly what he did do or did not do.

By the Court: Let the amendments be made.

By Mr. Walker: The defendants except to the action of the Court and move for a mistrial.

Motion overruled. Defendant excepted.

By the Court: Go ahead with the witness.

By Mr. Norvell:

Q. I just asked you if you would produce that record when Mr. Walker and myself argued that exception. Please read your record showing when Sinclair, and by the way, was his name Sinclair or St. Clair.

A. Sinclair, that is the way he gave his name.

Q. Anyway, the flagman, on that train, whether his name was Sinclair or St. Clair, will you kindly read from your record showing

when he came into the employ of your road, what he was first doing and when he first ran on this northwestern train. If you have any summary to your record I wouldn't object to your stating the result, if Mr. Walker has none.

A. He worked on June 28, 1918, and June 29, July 1st and July 2nd, going over the road posting himself on the local conditions. [fol. 188] He claimed, as I recall it, that he had been in the railroad service for several years, but he was not familiar with this road. I think he came to us, if I recall it, I think he said from the B. & N. W. or some road down in West Tennessee.

Mr. Norvell: Of course that is objectionable as hearsay but I am not going to object to it.

Mr. Walker: I don't think it is hearsay.

By the Court: Any information he had which would go to the good faith of the employe- would be competent.

Mr. Norvell:

Q. Go ahead?

A. This date is recorded, what we call posting. On July 5th he was placed on the regular extra brakeman list, to be called first in and first out with the other men, and on the 6th and 7th and 8th he was used as a regular brakeman. On the 9th he was called for service and went out as flagman on train No. 4 which was wrecked, and he has not worked for the company since.

Q. Let me see if I catch you, your record shows that he came with you on June 28th?

A. June 28th and 29th, the first and second days our records [fol. 189] indicate that we put him to posting.

Q. In other words, your record shows that he commenced work June 28th 1918?

A. He was posting at that time. He went on as a regular full fledged employe- having passed the regular examination on July 5th.

Q. What do you mean by cubbing or posting?

A. That was going over the road with the other crews and learning the road.

Q. In other words, he had some connection with your road commencing June 28th in cubbing or posting?

A. Yes, he was posting?

Q. And that continued four days.

A. Yes, sir.

Q. And then on July 6th your record shows that he was a regular employe is that correct?

A. Yes, sir, that is, he was added to the regular list July 5th subject to call at any time.

Q. He was extra but when called he was then on some regular duty?

A. Yes, sir.

Q. He ran extra as what?

A. As brakeman or flagman, as he was needed.

Q. You have got brakeman, I am talking about the 6th and 7th of July, you have got brakeman, what does that mean?

A. He was on a freight train.

Q. Does that record show on what division?

A. That was on this division.

[fol. 190] Q. The Northwestern?

A. Yes, sir.

Q. That this accident happened on?

A. Yes, sir.

Q. On July 9th your records then show he was passenger flagman?

A. Yes, sir, he was called in his regular turn and went on a passenger train.

Q. On No. 4?

A. Yes, sir.

Q. Then your record- show that three days prior to that he had run on the Northwestern road as a brakeman that means freight, doesn't it, when you say brakeman?

A. Yes, sir.

Q. And then his first run as a passenger flagman on the Northwestern road was on No. 4 the morning of this accident?

A. Yes, sir.

Q. In looking at the summary of the record you produced where he worked as brakeman, the 6th, 7th and 8th, I see you have on the 6th fifve hours, 7th four hours and 8th one hour?

A. No, sir, that is the over time he received in addition to the day.

Q. Mr. Templeton you say your records show that Sinclair had no further connection with the road after July 9th?

A. Well, we carried him on the seniority roster for sometime, and [fol. 191] tried to get him to come on back and work and he wouldn't do it. He never worked any since. He could have worked if he had wanted to.

Q. You carried him on the seniority roster sometime. About how long?

A. In fact he is still on there, he has never shown up and never worked any since. We tried to get him to come back to work and I believe he said he was sick. The next time I wrote him the letter was returned and not delivered and I haven't heard any further from him since.

Q. Since the accident you and other railroad men on your behalf have seen Mr. Sinclair and you have been corresponding with him you stated, he was sick you say since the accident?

A. Yes, sir, I have.

Q. Mr. Templeton, about how long after the accident did you or your road keep in touch with Mr. Sinclair, I am not asking you for details of it, but how long did you keep in touch with him so that you knew where he was?

A. Well, the only record that I had of him was the address that he gave when he went away and I wrote him and I only, I believe, received one letter from him, that was the time that he said he was sick and couldn't come in and work.

Q. How late was that, have you got it there?

[fol. 192] A. I probably have it somewhere in these files. August 29th, 1918, was the last one I had. On November 4th 1918, the letter was returned unclaimed.

Q. I mean the one before that when he answered you?

A. That was August 29th, 1918.

Q. You say your letter to him was asking him to come and go to work?

A. I said, "Please refer to my letter of the 14th and advise when we may expect you to return for work. We are depending on you to report for an early date as we are in need of your services." That was what I wrote him.

Q. That was the last?

A. That was the only — he answered August 29th and I wrote him again and it was returned.

By the Court: Have you got his answer there?

A. Yes, sir, do you want me to read it?

By the Court: I think it is competent and I so instruct the jury that on yesterday the witness Eubanks testified that he hadn't run as conductor since this accident, but has been employed at the new shops, the jury will not draw any inference of negligence by reason of that fact, and the jury will not draw any inference of negligence because of this flagman not running as a flagman any longer than [fol. 193] he did.

Mr. Norvell:

Q. Now, Mr. Templeton, Mr. Eubanks ceased to work as conductor after July 9th?

A. Yes, sir.

Defendant objected to question and answer.

Objection sustained.

Q. He has been in the shop department ever since July 9th, 1918.

A. No, sir.

Q. Where has he been with the road since July 9th?

A. I don't know. I can't say. He has not been in my department. I understood he was working at the shops sometime ago, but I don't know when he went there. I have no record of that.

Q. You answered me positively a minute ago that he hadn't been working there all the time, do you know about when he went to the shops?

A. Yes, sir, it was sometime after the accident. He was working down there at the Terminal Company. He wasn't at the shops then.

Q. Now, Mr. Templeton, will you kindly produce any record you have in connection with the cessation by Eubanks of working as a conductor. I will ask the Court to let me go into that.

[fol. 194] By the Court: I will let the jury retire if you want to get it in the record.

Mr. Norvell: I do.

By the Court: Step out for a minute, gentlemen of the jury.

The jury here retired.

By the Court: I have already stated to the jury what I considered a sound proposition, without further elaboration, that is, that the company would have the right to discharge him absolutely without any inference of negligence being drawn from it, and this flagman would have the right to quit without any negligence being charged to the company on the part of the flagman, and they would have the right to discharge him the same as they would any other employe.

Mr. Norvell:

Q. I want to reform my question and want to make it more succinct since the jury is out of the court room. Mr. Templeton, I will [fol. 195] ask you if after this accident the railroad acting through you or some other high official did not demote Mr. Eubanks as a conductor on the ground that he had violated a rule when this accident occurred, and will you kindly produce the record in which the statement is made as to why he was demoted. Will you kindly pass it to the Court.

A. He wasn't demoted, he was discharged.

Mr. Norvell: Will your Honor allow that record to be read in the absence of jury?

By the Court: Yes.

Q. Read it to the stenographer?

A. The record notice 159, dated July 26th, 1918, states a conductor has been discharged for failure to observe operating rule No. 83, which in part reads as follows: "A train must not leave its initial station on any division, or a junction, or pass from double to single track, until it is ascertained whether all trains due, which are superior, or of the same class, have arrived or left." Signed W. G. Templeton."

Q. That is dated July 26th, 1918?

A. Yes, sir.

Q. And is entitled Record Notice 159.

[fol. 196] A. Yes, sir.

Q. What do you do with those record notices?

A. We file them. We have a copy sent to the man to whom it refers.

Mr. Norvell: My proposition is just this: of course the mere fact that he was discharged, or the mere fact that he left the employee is entirely incompetent for any purpose except the one your Honor and Mr. Walker mentioned that showing he has been in the employ of the road might affect his interest as a witness. I understand that thoroughly and I won't dispute that, what I am after was this record, which is an admission by the road that this fellow servant violated a rule and was negligent. Now Mr. Walker asked Mr. Eubanks my witness about what ought not to have been done, the tendency of his question was, you didn't have to do anything, you

did all right, there certainly was no negligence on your part, this all — old man's Kennedy's fault. Now then, it is relevant to show an admission, particularly a solemn admission evidently made after an investigation. I can go into that by the defendant that if through [fol. 197] this fellow servant this other employe was negligent and that rule was violated.

By the Court: The Court holds that is incompetent for the same reason. It is incompetent in the first instance otherwise no employe would be discharged because that would be making evidence against themselves, a confession of having incompetent employes in their services and such would be against public policy.

Objection sustained.

Plaintiff Excepted.

Mr. Norvell:

Q. While the jury is out let me ask one more question so as to have it in the record. Mr. Templeton before this record was promulgated or written on July 26th which you have just read, I will ask you whether or not the road had made an investigation.

By the Court: Pursuing this question further, the company in the discharge of an employe in most instances, in fact in every instance would give a reason why it had discharged him. If he violated a rule he would be discharged for that reason and no company [fol. 198] would be safe in discharging an employe on the ground that it would be making evidence against itself or proof of confession of negligence of its employe, and it is incompetent I think for that reason the same as the first instance stated by the Court. I want to make myself clear.

Q. Now Mr. Templeton I want to ask you to read into the record in this case the record, or any portion thereof that you have, in which your road stated a rule had been violated by this conductor, and entirely disconnected with any action or any portion of the notice reciting that he has been discharged?

Mr. Walker: Of course that would call for this same answer including the portion that he was discharged.

Mr. Norvell: I am not trying to ring in here that he was discharged, but I think I am entitled to the admission before the jury and I would want to go on further. I wouldn't want to put in there that he was discharged, but I think I am entitled to any admission [fol. 199] that this company either in person or through another servant was negligent, and that under its rules it through this servant was negligent. I just want to call for that portion of the record whether the road made a statement entirely disconnected with any part of the record, showing why he was discharged from the company.

By the Court: I will sustain the objection for the present. I will debate the question further in my own mind and may allow the witness to be recalled.

Plaintiff excepted.
The jury here returned.

By Mr. Norvell:

Q. Mr. Templeton, this was not in your subpœna duces tecum, but Judge Bruan, and I talked to you the other morning when the case was first called in Judge Langford's court, it was my recollection that either I asked you or Mr. Kerrigan to endeavor to find out from your record how long Mr. Kennedy had been with the road, was it you that I asked?

A. Yes, sir.

Q. Did you find that out since?

A. From the best information that I could get it seems that he came to this road as a fireman in 1870 and was made an engineer in 1877.

[fol. 200] Q. Then he was with the road about forty-eight years?

A. Yes, sir.

Q. Now Mr. Templeton, will you kindly tell me please what higher official of your road is familiar with the pension system that you have?

A. The age?

Q. The pension system that you have on your road, who would have the rules or records or be familiar with that?

A. If we have one at this time I should say the General Manager would know.

Q. I understood you in talking to you before you came on the stand that you yourself were not familiar with that?

A. I don't know whether we have one or not, we used to have one, and I understand that it was abolished with Government control, and whether it is reinstated or not I don't know.

Q. Don't you all have pensions?

A. The old pensions, but I say, as to the rules now, whether it has been reinstated since the road was turned back I don't know.

Q. The only question I am asking you is, who is the man that can tell me, you say you are in doubt, you know enough about the road to tell me that?

A. Mr. Bruce ought to know, it is handled in his office, or the secretary Mr. Clarkson ought to know?

[fol. 201] T. A. Clarkson?

A. Yes, sir, he was at one time secretary of the Board.

Q. Then you think Mr. Clarkson or Mr. Bruce would be the ones?

A. I expect Mr. Clarkson could tell you. He was secretary of it.

Q. Mr. Templeton, you don't keep the records of the engineers and fireman and their services, that is a matter that Mr. Kerrigan handles, you keep the conductors and flagman and Mer. Kerrigan keeps the engineers and fireman?

A. In what respect?

Q. I mean who was on duty and how long?

A. Mr. Kerrigan would have that.

Cross-examination.

By Mr. Walker:

Q. Mr. Templeton how many days had Mr. Sinclair been in the employ of the United States Railroad Administration in the operation of N. C. & St. L. Railway trains prior to this accident on July 9th.

A. Well in actual operation of a train he had been in the service, I mean he was in the service on July 6th, 7th, 8th and 9th.

Q. I didn't catch that?

[fol. 202] A. He was in actual service in the operation of a train for which he was responsible July 6th, 7th, 8th and part of the 9th.

Q. What railroad experience had he prior to that time?

A. Why I think he told me he had some experience on some other road, I don't remember what it was, but as well as I remember it was the B. & N. W. in some capacity.

Q. For how long?

A. I don't remember how long he was there, but I know it only took him about four days to qualify as a brakeman and to be recommended by the conductors as being thoroughly competent and he would have to have had considerable experience to have done so.

Mr. Norvell: I object to the last part of the answer that he had been recommended by some conductors.

Objection sustained.

Mr. Walker: That goes to the good faith of their employing him and as to whether or not they were exercising ordinary care.

By the Court: Was he examined?

A. Yes, sir, and recommended by conductors.

By the Court: And recommended by those holding the examination?

[fol. 203] A. Yes, sir.

By the Court: Let the answer stand.

Mr. Walker:

Q. How many trips, or if he had made any before July 9th, had he made on this same road prior to the day of the accident?

A. He seems to have made two with conductor Legg and one with conductor Smith, which would be four days.

Q. That was over this same route?

A. Yes sir.

Q. He was injured in the wreck, was he not?

A. Yes, sir.

Q. Do you know where Sinclair is now?

A. No, sir, I do not.

Q. When is the last information you have with reference to his whereabouts?

A. That was August 29th, 1918, the last communication I have, or heard of him?

Q. So you don't know where he is now?

A. No, sir.

Q. Do you know anybody that does know where he is or anyway to ascertain his whereabouts?

A. No, sir, I do not.

Q. He is now in the employ of the railroad?

A. Not so far as I know, no sir.

Q. The railroads were taken over by the Government on the 29th of December 1917, were they not?

[fol. 204] A. Yes, sir.

Q. In 1918, on July 9th there was a powder plant in operation here at Jacksonville about twelve or fifteen miles from Nashville, wasn't there?

A. They were constructing one out there and probably had some of it in operation.

Q. They employed about twenty-five to thirty thousand men out there, didn't they?

A. That was my understanding.

Q. Did they take many men away from the railway system or not?

A. Why it took a great many away, the increased business had more effect though than the actual taking of the men away from the road.

Q. I am coming to that, but at any rate the high wages paid out there did take considerable railroad men away?

A. They took several, yes.

Q. What was the amount of traffic going on in July 1918?

A. It was about double what the ordinary traffic was, the freight traffic and I expect the passenger about the same.

Q. What was the condition of the N. & C. and other railways at that time with reference to the want, the lack of equipment on account of the immense amount of traffic?

A. We were very short of equipment.

[fol. 205] Q. Due to what?

A. Due to the increased volume of business.

Q. What was done with passenger coaches and such equipment with reference to the transportation of soldiers at that time?

A. Why they were *went* to various cantonments to move troops as they were ordered by the Government.

Q. Sinclair before *me* made that run was examined, was he not by the rule examiner with reference as to whether or not he was familiar with the rules, a copy of which I *told* in my hands, being an exhibit to the testimony of Mr. Eubanks?

A. I haven't got, I don't seem to have the record, I mean the notice of who examined him, but he was examined before he was put on there either by the train master or train rule examiner, but I think the train rule examiner.

Q. He qualified as a competent flagman and man familiar with the rules?

A. Yes, sir.

Q. Train No. 4 that collided with train No. 1 was a local train, I believe.

A. It made local stops, yes, sir.

Q. And train No. 1 was a through train?

A. Yes, sir.

Q. Train No. 1 was a southbound train.

A. Yes, sir.

Q. Train No. 4 was a northbound train?

[fol. 206] A. Yes, sir.

Q. Train No. 1 was what is termed as a superior train?

A. Yes, sir.

Q. Why was that a superior train?

A. It was so in the general scheme of operating the railroad, we agreed by time table certains — as being superior to the other, and in this particular case No. 1 and No. 4 were the same class trains but the time table provided that No. 1 should be superior because it was a south bound train, designated south bound trains as superior to north bound trains of the same class.

Q. In other words, they were both trains of the same class but train No. 1 was the superior in that it was a south bound train?

A. The rules provided that south bound trains were superior.

Q. They provided that south bound trains had superiority over north bound trains?

A. Of the same class.

Q. What right did train No. 1's superiority give over train No. 4.

A. He had absolute right of the track.

Q. That is to say, train No. 1, unless the persons in charge were given an order to the contrary had the right of way over the main track at all points?

A. Yes, sir.

[fol. 207] Q. And train No. 4 being the north bound train was compelled to take sidings or switches in deference to train No. 1 and keeping out of its way.

A. Yes, sir.

Q. Now what controlled the movements of train No. 4 on the morning of July 9th, 1918, from the Union Station at Nashville to the shops some three miles away?

A. She was handled by block system up to just south, or just north of the overhead bridge at the Clifton Pike crossing, there he left the end of the block and he was controlled from there on through the interlocking plant by signals, and from there he was controlled by train orders or time table.

Q. How far is it from the Union Station to Shops, to the tower?

A. About two miles and a half.

Q. How far is it from this overhead bridge as you proceed in the direction of the tower to the tower?

A. I would *just* it is about a thousand feet, something like that.

Q. How far is it from the shops, from the shop tower as you go on in the direction of Hollow Rock Junction to the point where the double tracks ends beyond the power?

A. I would judge six or seven hundred feet.

Q. Now there is a double track there, is there or not leading from [fol. 208] the Union Station to this overhead bridge and on from the overhead bridge to the tower and from the tower about six hundred feet beyond in the direction of Hollow Rock Junction?

A. Yes, sir.

Q. And there the double track ends and runs into the main?

A. No, it don't end there. The track continues.

Q. I meant the interlocking switch ends?

A. Not necessarily, it can turn a train and turn on up the west Nashville track, that same track goes to West Nashville.

Q. I mean in so far as the purpose of the double track, in so far as a train running from Nashville on to Hollow Rock, the double track ends about six hundred feet beyond the shops tower in the direction of Hollow Rock.

A. Well, that is the end of the double track, they can go on up and head out under the Tennessee Central overhead bridge, but that is the common use of it, about 600 feet north of the tower.

Q. After you leave the double track beyond the shop tower and get on to the main, the next passing point is what, a station called Harding?

A. Yes, sir.

Q. Now there is a switch or spur track there for trains to pass?

A. Side track.

Q. How far is it from where the double track ends there running [fol. 209] into the main to the station at Harding?

A. It is about five miles.

Q. Now it was between the shops and the station at Harding that trains No. 1 and No. 4 collided?

A. Yes, sir.

Q. I understood you to say that the block system controlled the movements of train No. 4 from the Union Station to this overhead bridge about a thousand feet towards Nashville from the Shop tower, is that correct?

A. Yes, sir.

Q. And there was signals that controlled the moverment of train No. 4 from this overhead bridge up to the tower and past the tower to the point where train No. 4 left the double track and went into the main?

A. Well, the signals between the end of the block and the end of the double track are not necessarily control signals, it is an inter-locking plant, they go into the interlocking plant and an interlocking plant means that the switches are interlocked, I mean the signals are interlocked and the switches are controlled by the tower, and the signals indicate the routes the switches are lines. That don't give trains any authority other than indicate to them that this route is lined up or that route is lined up, or this route, it shows them which route the switches are lined and signals locked.

Q. What rule or regulation is it that governs the operation of [fol. 210] train No. 4 or a similar train in that regard?

A. Well, it depends on where the man wants to go. It is not necessarily a matter of rules. You can line up a route for a switch engine, a motor car or a train. If he doesn't want to go that route he simply doesn't go and then you have to line up another route, or find out where he wants to go. There is no rule that I know of to make him go any where unless he wanted to.

Q. Now under the practice in the operation of the trains, the operator at the shops, does he have any control over the movements of the trains as to whether they have the right to make a through movement or to stop, or how is that?

A. The operator at the shops, he has no control over the trains other than he lines the switches the way he thinks a train will probably want to go. If it is a light engine he would probably think it would want to go to the round house and he would line up the switches and give a signal into the round house, if it was a cut of cars he might think they wanted to go to West Nashville, and if it was a main line train he would naturally give the signals to line up to the main track.

Q. Mr. Templeton, at the time this wreck happened on July 9th, 1918, did the operator at the shops know what the train order were that controlled the movements of train No. 1 and train No. 4 or [fol. 211] know where their meeting places were?

Objected to for the reason that the operator is a witness and he can't testify as to what the operator did or did not know.

Mr. Walker: I am talking about the practice and regulations that govern it.

Objection overruled. Plaintiff excepted.

A. You mean the practice or this particular case?

Q. No, as to the practice.

A. No, sir.

Q. Now to illustrate that before the Court and jury if No. 4 had come in that morning and the switches had been thrown so as to permit No. 4 to leave the double track and go into the main and a proceed signal had been given and No. 4 accordingly proceeded past the shops and on to the main line, under the practice the operator at the shops would not have known, would he, where No. 4 was to meet No. 1?

A. It wasn't any of his business where they were going, all he had to do when he saw the train coming was to line up the switches he thought the train would want and if he didn't want to go that way he simply stopped and he had to give him another route or wait until the fellow told him where he wanted to go. He had no [fol. 212] control over the train. It wasn't any of his business where he was going, only to line the switches.

Q. To further illustrate the point I have in my mind assuming that train No. 4 left the Union Station and came on to the shops and the switches were thrown so as to permit No. 4 to leave the

double track and go into the main, and the signals were pointing so as to indicate that the switches were so thrown, and the engineer on No. 4 had an order that No. 1 had engine 281, but the engineer had not ascertained the arrival of No. 1 between the shops and the Union Station, did the fact that the switches were thrown and the signals pointing to the fact that they were thrown so as to permit No. 4 to go out on to the main give the engineer of train No. 4 any right to proceed past the shops?

A. None whatever, no sir.

Mr. Norvell: I want to enter this objection and as- your Honor to rule on it, with the understanding that your Honor can allow him to proceed if you rule favorably to me, or allow him to come on later. I don't understand when I put the witness on the stand and simply ask him to produce a record that that entitled him to cross [fol. 213] examine on other matters. I only asked this witness to produce records, and I want to make the objection to this proceeding to cross examine him in this record as my witness.

Mr. Walker: This is the distinction between the Federal court rule and the State court rule, if they put him on the stand to prove one thing that on cross examination I can prove a thousand things.

Mr. Norvell: There is a further distinction. When a witness comes in response to a subpœna duces tecum and is simply asked to produce records on the stand, and he produces the record, then that does not make him your witness either in the State or Federal court to be cross examined as to the facts of the case. If I had asked him about the facts of this accident other than the production of the record, then Mr. Walker is entirely correct. For instance, a subpœna duces tecum is frequently used to get the other part here. That is what it is here. Mr. Templeton stands for the railroad to produce the record and that does not put him on the stand and make him [fol. 214] my witness to be cross examined on the facts. If I had asked him about the facts then Mr. Walker would be entirely correct, but when I asked him to produce the records, then he is not entitled to cross examine him on the facts.

Mr. Walker: He amended his declaration over the objection of the defendants alleging that the company was guilty of negligence in that it employed this man Sinclair. They asked him to state to the Court and jury how long he had been in the employ and how many runs he had been running over there. This is the evidence. Now I am asking him these things on cross examination.

Mr. Bryan: In addition to that Mr. Norvell said I want to suggest this furthermore, particularly what I think is incompetent about the answer of the witness to the question of Mr. Walker. Mr. Walker very properly said in the very beginning that the rule is the best evidence of what these employes were required to do. We are trying this case upon that. Now he has gone outside of the rule to ask this witness whether or not regardless of how that signal was this [fol. 215] enginer wouldn't have the right to go forward with train No. 4 that morning. The rule is the best evidence that he has introduced that we are standing upon. Therefore I suggest to your

Honor that this is incompetent for the reason that he has heretofore urged that the rule is the best evidence and we must stand on that and under that. When we come to the jury the jury will be the judges of what they can argue from the rules, so can we. At least it is a question for the jury who is in the right or who is in the wrong in this matter. I therefore except to the answer of the witness to that question of Mr. Walker.

Mr. Walker: Assuming that the facts were as stated by Judge Bryan he would be correct in his conclusion, but I asked Mr. Templeton what rule it was that governed and controlled the operation of train No. 4 at that point and he said there was no rule, and he said the practice was so and so.

By the Court: I expect it is incompetent at this time, you may recall him later on. Objection sustained for the time being. Defendants excepted.

[fol. 216] Mr. Walker: What have I got the right to cross examine him on. I want to conform with the ruling of the Court, but the way it seemed to me, they put him on to prove by this witness how long Sinclair had been in the employ and what he had done, and then I am taking him up on cross examination and proving these things by him for our side as his witness.

Mr. Norvell: Your Honor has made the suggestion and I made the offer that you can proceed with him now as your witness put on out of his turn.

Mr. Walker: I am insisting Mr. Templeton is the plaintiff's witness, and when he puts him on he puts him on as an accredited witness, therefore I have the right to cross examine him on all matters. I want to ask one question:

Q. Previous to the time that you went on the stand Mr. Templeton you had these records about which you were asked while on the stand with you here at the court house, didn't you?

A. Yes, sir.

Q. You brought them here?

A. Yes, sir.

Q. Now before you went on the witness stand you talked to Mr. Norvell or Judge Bryan, the attorneys for the plaintiff in this case, [fol. 217] and showed them the records, did you or not?

A. I showed them all they wanted to see and answered all their questions.

Q. And then after they have a conversation with you and after you showed them the records they put you on the stand and interrogated you about them?

A. Yes, sir.

By the Court: You insist you have the right to ask him about these matters as the witness of the plaintiff?

Mr. Walker: Yes, sir.

By the Court: Of course if this was in the Federal Court Mr. Norvell, I think would be right, but the rule in the State Court is absolutely direct to the rule in the federal court.

Mr. Norvell: Mr. Walker asked him about showing us the record. That is entirely correct. He did that, but that does not alter the situation. We couldn't get up and state to the Court, here is something that Mr. Templeton says is in the record. We have to [fol. 218] actually introduce the record in court, except by consent of the other side, through the witness in charge of them. The fact that he talked to us didn't entitle us to get up and say to your Honor, here is a paper the witness says is the record and we want to put it in.

Mr. Walker: This looks like it is a fair illustration of the matter. Suppose Mr. Templeton had in his possession a contract between two parties to a suit and knew that the parties executed it, and they put him on to prove that that contract was executed, then wouldn't I have the right to cross examine him not only on that but on all matters. Why, may it please the court, suppose they put a defendant on the stand in a personal injury case to prove that he was the owner of an automobile and that the driver was in his employ and performing his duties then couldn't I go ahead and prove all about the accident, and prove everything that he knew.

Mr. Norvell: Yes, you could, but — I asked that owner to come to [fol. 219] the stand and produce a contract between himself and his driver and then stopped you couldn't ask him.

Mr. Walker: Yes, just showing the employment, then I could go ahead.

Objection sustained and defendants excepted.

Mr. Norvell: If it suits your convenience and care to do it I agree that you may go ahead with him now as your witness.

Mr. Walker: No, sir, I feel confident I am right about it and I don't want to waive any rights. May if please the Court I don't know what to cross examine him on, except about these records.

Stand aside.

I except to the action of the Court. I want to get some things into the record that I would ask him as their witness in addition to these things and get the benefit of it coming from him as I insist he is your witness.

[fol. 220] By the Court: All right, go ahead.

Mr. Walker:

Q. Then, Mr. Templeton, as I understand you, if the signal at the shops showed the engineer on Train No. 4 that the signals were set showing that the switches were lined up so as to permit him to go out on to the main, unless the engineer had personal knowledge that train No. 1 had arrived and passed by him between the shops and the Union Station, he had no right to go out?

A. He did not, no sir.

Mr. Bryan: Of course the Court understands that we are objecting to that.

Redirect examination.

By Mr. Norvell:

Q. Now, Mr. Templeton, you were asked the question by Mr. Walker what right this engineer had in the operation of this train. What right did the conductor have to allow the train to proceed under the conditions Mr. Walker has just detailed?

A. He didn't have any.

Q. Now, Mr. Templeton, of course the conductor can angle cock or can pull down the train, that is true, a passenger train?

[fol. 221] A. I didn't catch the question?

Q. I say, the conductor can angle cock, or pull down the rope attachment?

A. Yes, sir.

Q. Now your orders were not only furnished in this instance, and by the way Mr. Walker put an order in the record, not only in this case was the order directed to the conductor and engineer but that is your uniform rule and custom with train orders?

A. Yes, sir, they are addressed to them.

Q. That is the rule and practice to deliver them to the conductor and engineer, isn't it?

A. Yes, sir.

Q. It is not only your rule but your custom of passenger trains for your conductors to show their orders to their flagmen and the engineers to show them to their fireman, that is true, isn't it?

A. Yes, sir.

Q. Now, Mr. Templeton, why is that, why must they show their train orders to their respective subordinates?

A. If they have a wait order or a return order the flagman should after reading it, if he sees they have forgotten it, call their attention to it.

Q. Then Mr. Templeton if the conductor or engineer, I will first put in the conductor, if the conductor is busy on some other duties [fol. 222] isn't it the duty of the flagman to call the attention of the conductor to the fact that the train order is not being observed isn't that the reason of the rule, and isn't that his duty?

A. I don't know that there is any special reason for it?

Q. Isn't it his duty then?

A. It is his duty if he sees the conductor is overlooking or violating an order to call his attention to it as a matter of precaution.

Q. And likewise as to the fireman with relation to the engineer.

A. Yes, sir.

Q. In other words, you are running a passenger train where you have not only got the lives of the employes but the lives of other passengers at stake, and you gentlemen have these rules so as to cast some duty on each of these four parties, isn't that true?

A. I didn't catch that.

Q. I say, your road has these rules so as to cast some duty on each of these four parties to see that train orders are observed, namely the primary duty on the engineer and conductor and then upon the flagman and fireman to assist each one of the others?

A. Well, the main duty is on the engineer and fireman, and as a precautionary measure require the fireman and brakeman to see the train orders, but we do not require them to check register and know what other due trains are.

[fol. 223] Q. I understand, now Mr. Templeton have you ever had the situation to arise on your road during this powder plant or war when your equipment was always over-crowded and your conductors were just so worked on your passenger trains they couldn't do much except take up tickets and work their way through, did your road ever issue any orders for flagman to be particularly observant then?

A. I don't recall it, no sir.

Q. Now in regard to this shortage of equipment, efficiency of equipment, that was fairly bad sometimes wasn't it, that just didn't happen on July 9th.

A. No, we had been short more or less for sometime, yes, sir.

Q. And the fact is you need a whole lot of new equipment, now don't you?

A. Yes, sir.

Q. So you have been in that shape sort of for three years or more?

A. We have been short of equipment for two or three years.

Objected to what it is now.

Q. All right, I mean that time and for some little time back?

A. After we got into the war and the activities started up in this country we began to get short and was short at the close of the war.

[fol. 224] Q. And it would be a fair statement that that condition existed not only on July 9th but for some little time before that?

A. Yes, sir.

Q. Now, Mr. Templeton, Mr. Walker was asking you how far different distances were and times trains should get there, you are familiar with the time tables.

A. Yes, sir.

Q. If you haven't it with you there will you ask counsel or Mr. McConnell to pass you the time table that they have I want to catch the time the train left the station and the exact time it was due at the shops and the exact time it was due at Harding. Mr. Templeton, I just want to get very quickly, have you the time table there now?

A. Yes, sir.

Q. Just when No. 4 was due to leave the Union Station and when it should reach the shops and when it should reach Harding?

A. It was due to leave the Union Station at 7 A. M. and shops at 7:08 A. M. and Harding at 7:15 A. M.

Q. How far is it from the Union Station to the shops?

A. 2.54 miles.

Q. From there to the Orphan Asylum where this wreck occurred how far was that, do you know that?

A. About two miles.

Q. How far is it from the shops to Harding, that shows on your schedule?

A. That is 3.32 miles.

[fol. 225] By Mr. Walker: I certainly think that in view of this examination that the whole of Mr. Templeton's testimony should go to the jury.

Mr. Norvell: You proceeded to examine him after the Court ruled and I offered to let you go ahead now if you saw fit and you proceeded.

By the Court: Gentlemen, it is right difficult to decide when a witness who is introduced by one party becomes the witness of the other party. I will decide when we come back here after recess. If you have any authorities I will hear you but I want to make some investigation.

Further this deponent saith not.

[fol. 226] Dr. W. W. McCabe, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Bryan:

Q. Are you Dr. McCabe?
A. Yes, sir.
Q. What is your first name Doctor?
A. William.
Q. Dr. William M. McCabe?
A. Yes, sir.
Q. Where were you graduated doctor?
A. At Vanderbilt.
Q. How long ago?
A. 1913.
Q. Have you been a practicing physician ever since?
A. Yes, sir.
Q. Have you held any official position as a physician in the City of Nashville.
A. Superintending surgeon at the Nashville City Hospital.
Q. For how long.
A. Eight years.
Q. Were you acquainted with D. C. Kennedy and his family?
[fol. 227] A. Yes, sir.
Q. How long have you known Mr. Kennedy?
A. I have known him all my life.
Q. Are you acquained with Mrs. Kennedy?
A. Yes, sir.
Q. Were you in Nashville at the time of the railroad accident in which he lost his life?
A. No, sir.
Q. Where were you?
A. In France.
Q. In what service.

A. In the army.
Q. What was your rank doctor?
A. I was a captain and promoted to a major.
Q. In the medical corps?
A. In the medical corps, yes.
Q. Doctor, tell the court and jury, if you please, as you knew Mr. Kennedy, what character of physique, and whether he was a man of physical activity or not?
A. Yes, sir, Mr. Kennedy was a man of physical activity, very active.
Q. Doctor, it has been shown that he was 72 years of age at the time of his death, did he look that age.
A. No, sir.
Q. State whether or not he was a younger looking mand and more active than the average man of that age?
A. He was.
Q. How long before his death was it that you saw him?
[fol. 228] A. I saw him just before going to France in 1917.
Q. What was the condition of his health at the time that you last saw him?
A. Very good, he was up and around actively.
Q. Prior to that was his health good or bad?
A. I have never known him to be ill.
Q. Never known him to be ill?
A. No, sir.
Q. Doctor are you familiar with the Carlisle Mortuary tables?
A. I know of them, yes sir.
Q. You know it is a standard table?
A. Yes, sir.
Q. And used by Insurance people and others in ascertaining the average life of citizens under certain conditions?
A. Yes, sir.
Q. Assuming Doctor that Mr. Kennedy was 72 years of age in July 1918 when he lost his life and further that this table—by the way I will ask whether you agree it might be used?

Mr. Walker: Yes, no objection.

Q. And is according to this table, having attained that age, that his expectancy of life was 5.24 years, approximately 5½ years, what would you say from your knowledge of his physical condition whether he would live that long or longer?

[fol. 229] Objected to because speculative.
Sustained.
The witness answered out of the hearing of the Jury: "Yes, he would."
The following question was asked and answered give- out of the hearing of the jury:

"Q. Doctor when you say he would, you mean he would live longer than his average?
A. Yes, sir.

Mr. Bryan:

Q. Let me put it in another form, if the Court please, if according to the mortuary table to which I called your attention the average length of life of a man who attained the age of 72 years is five and a half years I will ask you to state whether or not from your knowledge of his physical condition and activity whether in your opinion he would live to be a greater age than the average?

Objected to for the same reason, speculative.

Mr. Walker: He can do this, he can prove that Carlisle Mortality Table which is a fixed standard rule and from the other proof in the case let the jury infer whether he would live longer.

[fol. 230] Objection sustained.

In the absence of the jury the following question was asked and answer given.

Q. Dr. McCabe you have testified and as shown by the Carlisle Table, which has been exhibited and made a part of your testimony in this case, that Mr. Kennedy's expectancy of life at the age of 72 years, when he was killed, according to that table, was something less than five and one half years, now please state from your knowledge of Mr. Kennedy's health and physical vigor, at the age of 71 years, when you last saw him to what age, barring accident in your opinion might he not reasonably have lived, that is, his reasonable expectancy of life?

A. From eighty to eighty-five years of age."

Plaintiff excepted to the Court's ruling.

Q. Doctor, I believe you stated that you are acquainted with Mrs. Kennedy?

A. Yes, sir.

Q. And have known her for many years?

[fol. 231] A. Yes, sir.

Q. Have you treated her as a physician.

A. Yes, sir.

Q. I will get you to state if you have seen or treated her recently?

A. Yes, sir.

Q. I will get you to state to the Court and jury what is the condition of her health at the present time.

A. Well, I examined Mrs. Kennedy last Sunday, the 17th and found her condition normal in every way except her hearing.

Q. She is very deaf.

A. Yes, sir.

By Mr. Bryan: I want to ask the witness similar questions with respect to the prospective life of Mrs. Kennedy at the age of 56 when her husband died, what her prospects of life would be.

By the Court: Any other question you want to ask him besides that one?

Mr. Bryan: No.

By the Court: Ask him the question, or you can agree on that.

Mr. Norvell: We had bettern state this, that the Carlisle Table

[fol. 232] at 56——

By the Court: You can insert that in the record.

Mr. Norvell: That was competent, they didn't object to that. I see the Carlisle Table shows the expectancy at the age of 56 of the average person 9.280 years, and at 58 years 8.772.

I believe it is agreed that we may ask the same questions in regard to her as we did to Mr. Kennedy and agree on the answer.

By the Court: Yes, there was an objection made to it and sustained as to that part of it.

Cross-examination.

By Mr. Walker:

Q. Dr. McCabe, you didn't examine Mr. Kennedy like you did Mrs. Kennedy?

A. No, sir.

Q. You never did examine Mr. Kennedy?

A. No.

Q. You never did make an examination of his urine or anything like that?

A. No.

[fol. 233] Q. Of course, all you know about him is what you saw from general observation?

A. That is right.

Q. It is a fact that when a man gets to be 72 years of age, after having a hard life of manual work that when his system does commence to go down it goes fast.

A. Well, there are two periods in a man's life that will frequently kill him, one is in his young life when he is subject to infectious diseases like measles, scarlet fever, typhoid fever and things of that kind another period is beyond middle life when he is susceptible to things like cancer, hypertrothy of the prostate, and diseases of that character, then after he reaches beyond that period he usually dies from the effects of old age, hardening of the arteries and hemorrhage of the brain which results from hardening of the arteries and diseases of degeneration.

Q. Those are deceased of the old age?

A. That is right.

Q. Mr. Kennedy was seventy two I believe.

A. Seventy-two.

Q. So he was a little past three score and ten?

A. Yes, sir.

Further this deponent saith not.

[fol. 234] By the Court: Gentlemen of the jury, the witness Templeton who was on the witness stand and testified immediately preceding Dr. McCabe, counsel has withdrawn objections heretofore made to certain questions and answers so that you will consider his entire testimony. Counsel objected to his making statements as to the signal at the station called the Shops, and whether or not engineers have a right to pass out or not to pass out under certain

circumstances, you remember his answer to that question and it will be considered by the jury along with the other questions.

Mr. Norvell: I didn't catch your Honor's statement just then, what I intended to say to your Honor in the presence of Mr. Walker was that we waived any objection to the testimony of this witness at this time as our witness. Judge Bryan made a point on the question of competency. I didn't mean to withdraw that.

By the Court: That is not withdrawn and his objection is over-[fol. 235] ruled. The other objection made is withdrawn and the jury will consider his entire evidence.

Mr. Norvell: Now may it please your Honor, the jury will recall Mr. Glenn the paymaster was on the stand and he failed to get the record of Mr. Kennedy's earnings for the months in 1918, the last year of his life. I now want to file that statement showing his earnings from January 1st 1918 through July the same being filed by consent as Exhibit No. 2 to Mr. Glenn's testimony. The same shows, may it please the Court, and gentlemen of the jury that in January he earned $246.50, February $229.00, March $244.50, April, $231.75, May, $247.35, June $240.98, July, $73.17.

We had Mr. Kerrigan, who is Superintendent or Assistant Superintendent of the N. & C. Shops summoned here and asked him to bring with him the record showing how long the fireman on No. 4 had been running on that train and where he had been transferred from, and the record of the engineers and firemen on the North-[fol. 236] western Division on July 9th 1918. Mr. Kerrigan had to leave the city so we agreed that this might be read into the record as what he would state the records of the road shows on that point: "Fireman L. L. Meadows' record on Nashville Division was firing with Engineer Hulse on trains 95 and 94 prior to June 9, 1918, bid in job on Nashville Division with Engineer Carrick on Nos. 6 and 3 and went out on his first trip June 10th and stayed on this run until July 3rd, 1918. Bid in job with Engineer Kennedy on trains 4 and 5, went out on his first trip July 3rd, 1918, next trip July 5th, next trip July 7th and next trip July 9th and was killed. Fireman Meadows started firing December 17, 1904. J. A. Kerrigan."

I file this paper I was reading from as Exhibit No. 1 to the stipulation concerning Kerrigan's testimony.

J. A. Gibbons, called for the plaintiff, being duly sworn, deposed as follows:

[fol. 237] Direct examination.

By Mr. Norvell:

Q. This is Mr. J. A. Gibbons?
A. Yes, sir.
Q. Mr. Gibbons do you work for the N. & C. Railroad?
A. Yes, sir.

Q. What position do you hold with them?
A. Engineer.
Q. Mr. Gibbons, how long have you been working for the road, the N. & C.?
A. Thirty seven years I believe maybe longer.
Q. Mr. Gibbons, did you in your work on the railroad and otherwise come in contact with Mr. D. C. Kennedy?
A. Yes, sir.
Q. You at one time fired?
A. Yes, sir.
Q. Did you ever fire for Mr. Kennedy?
A. I fired for him practically all the time I fired, eight or nine years.
Q. Where did you first know him Mr. Gibbons.
A. Some three or four years before I commenced firing.
Q. How far back is that.
A. About 1883, about the time I went to work at the shop.
[fol. 238] Q. After you ceased to fire for him, you say you knew him three or four years before you fired for him and you fired with him eight or nine years, he was an engineer at the time you fired for him?
A. Yes, sir.
Q. Did you ever come in contact with him?
A. Yes, sir we were always good friends.
Q. Did you fire for him against after this eight or nine years?
A. Not after I was promoted I never fired for him.
Q. You say that you knew him, how well did you know him, were you a good friend of his?
A. Yes, sir.
Q. Come in contact with him frequently?
A. Yes, sir.
Q. Mr. Gibbons, the whole time that you knew him, what was his general health?
A. I think it was number one.
Q. Did you ever know of any ailment or physical trouble that he had?
A. No, sir.
Q. Now coming down to the last year or two of his life particularly, what kind of a man was he then in regard to his activity and ability to get around and handle himself.
A. I think he was an extraordinary active man for his age.
[fol. 239] Q. He was much above the average, wasn't he?
A. I think so.
Q. What kind of a man was he, was he a very heavy set man, or very well built?
A. I think he was a very well built man.
Q. Was he tall?
A. He wasn't so very tall, he was just an average man I think for his size.
Q. Neither thin nor fat?
A. No, sir.

Q. How did he get around in the last year or two of his life, how was he in walking and moving, was he as slow as men of that age should be or anything like that.

A. I always thought he was avery active man for his age.

Q. Mr. Gibbons, as to his physical appearance, would a man that didn't know his age or come in contact with him for a long time think he was a man seventy-two years of age?

A. He looked mighty well.

Q. Did he look that old?

A. I wouldn't think he looked that old if I hadn't known him so long and knew he was that old.

Q. Mr. Gibbons, he ran on the road a great many years and was on the road when you went with it?

A. Yes, sir, when I first went to work there.

Q. What kind of an engineer was he, I mean in this respect, was he a man who was careful in the observance of orders or not?

[fol. 240] Objected to and sustained.

Q. Now Mr. Gibbons, did you know him in his home life any?

A. Well, not particularly.

Q. Not so well there?

A. No, sir.

Q. Have you ever run on the Northwestern Division?

A. Yes, sir, I am running there now.

Q. You know where this wreck occurred that this lawsuit is about, don't you?

A. Yes, sir.

Q. Now I want to hand you a picture that has been made exhibit No. 1 to the testimony of Mr. Eubanks which has been introduced as purporting to show, looking toward it as coming from Hollow Rock, or approaching that bridge at the orphan asylum out there. In other words, the direction in which train No. 1, was coming, now Mr. Gibbons, train No. 4 ran out from Nashville, as train No. 4 was coming around back here on the other side of the bridge and approaching you as you are looking in the picture and this picture purports to show the rock just the other side of the bridge here, is there any cut back here that No. 4 would come out of?

A. Yes, sir, there is a rock out where the old bridge was, the old bridge to the orphanage.

Q. Now Mr. Gibbons, until you get out of that cut, can you see an approaching train any distance around, I mean the engineer on the engine?

[fol. 241] A. No, not right in the cut you can't.

Q. Now Mr. Gibbons, until you get out of that cut, can you see an approaching train any distance around, I mean the engineer on the engine?

A. No, not right in the cut you can't.

Q. Now Mr. Gibbons is that a cut there as you approach the bridge, as No. 4 was coming, coming towards you?

A. No. 4 would be on a curve, the cut would obstruct it a little bit.

Q. The picture shows the curve there?
A. It is coming the wrong way for No. 4.
Q. You are facing it, No. 4 is coming this way?
A. It don't show the cut.
Q. But it shows the curve.
A. Yes, sir.
Q. You say that picture doesn't show the cut, the cut would be back in there?
A. Yes, sir.
Q. You can only see the track in this picture just a little piece beyond the bridge?
A. That is all.
Q. Also as you come out of that cut approaching that concrete bridge there, state whether or not the abutments and undergrowth [fol. 242] in there, the abutments of that bridge obscure the view of an engineer on the train?
A. Well the piers might, but I hardly ever see any undergrowth there.
Q. What about the piers?
A. The piers of course would be a little bit in the way.
Q. Now Mr. Gibbons, did you go out to see this wreck?
A. Yes, sir.
Q. How far was the wreck this side of that concrete bridge represented in the picture there that you cross to go to the orphan asylum?
A. I don't know exactly, I imagine it would be about a third of the distance between the cut and the bridge, just a little over half way, but it was closer to the concrete viaduct I think.
Q. I am talking about the concrete viaduct, did you say about half way or a third of the way?
A. About a third, a little over half way. I never did measure it, but as far as I can remember, I was out there the next morning.
Q. Now Mr. Gibbons, say there is a train with an engine and tender and baggage car and about four or five coaches, was there space enough between where the wreck occurred, and this cut for [fol. 243] that train to have gotten clear out of there, the rear end of the train have left the cut,—you see of course the engines are out, they struck out there in that field or level space where that steam shows in that picture, but you said the cut was just back behind there, you said the point where the engines collided was about half way between the cut or a little more between the cut and this concrete bridge, what I am trying to get at is the space down there between the cut and where the wreck occurred with reference to a train composed of an engine, tender and five or six cars?
A. I don't know the distance, I imagine three or four hundred feet.
Q. That is about the length of a train of the size I have described, engine, tender baggage car and about five coaches?
A. Yes, sir.
Q. Now Mr. Gibbons, is there any grade right there?
A. Well not much grade there.
Q. Not much right there?

A. No, sir.

Q. Getting to that place and coming from town, was there a grade before you got there?

A. There was a grade coming to town, and up grade.

Q. Now Mr. Gibbons, have you ever made any tests as to what distance a train could be stopped on fairly level track at certain rates of speed?

A. No, I haven't.

[fol. 244] Q. In your experience as an engineer, did you know anything about that matter?

A. Well, I can't remember now the tests, of course they have got tests and I have heard of them, but I never made them.

Q. Have you had occasion to stop your train in cases of emergency where it looked like may be emergency?

A. I don't think I ever had a passenger train that I had to stop in emergency but one occasion, and I never stopped it then.

Q. How long have you been an engineer?

A. My record shows in 1896.

Q. What?

A. I think my record shows from 1896, then I have been running sometime before than when I was firing for Mr. Kennedy extra work in the yard.

Q. Have you ever run a passenger at all?

A. Yes, sir.

Q. You have on occasions?

A. Yes, sir.

Q. Now Mr. Gibbons, you are fairly familiar with the rules aren't you which the engineers and conductors are given, the book of rules?

A. Yes, sir, we are supposed to be, yes sir.

Q. Now, Mr. Gibbons, who has charge of the train?

A. The conductor.

[fol. 245] Objected to because the rules have been introduced and they show for themselves.

By the Court: Yes, sir, that might be a conclusion, objection sustained.

Mr. Norvell:

Q. Turn to Rule 105 in the rule book and read what it says?

A. "Conductor had charge of train and of all persons employed thereon, except when instructions conflict with the rules or involve risk, in either of which case- the engineman will be held alike responsible. Under conditions not provided by the rules, every precaution must be taken to insure protection to life and property."

By the Court: You read it Mr. Norvell.

Mr. Norvell: Conductor has charge of train and of all persons employed thereon, except when instructions conflict with the rules or involve risk, in either of which case- the engineman will be held alike responsible. Under conditions not provided for by the rules, every

[fol. 246] protection must be taken to insure protection to life and property." Have I read rule 105 correctly?

A. Yes, sir.

Q. Now Mr. Gibbons, the conductors as well as the engineers are furnished copies or orders, aren't they?

A. Yes, sir.

Q. Mr. Gibbons, under the practice as well as the rules of the N. & C. Road, and the custom, if an engineer for any reason ,whether it be negligence, or anything else, fails to observe and order as to a superior train and goes on out on to the track, what is the duty of the conductor?

Mr. Walker: It is not the custom that prevailed among the engineers or conductors that controls the case. If there is any custom it is the custom that prevailed between the employees operating that train. Of course a custom don't control anybody, it is immaterial and don't mean anything unless respective parties knew about it.

Mr. Norvell: All right, I will ask him exactly the question you asked Mr. Templeton, in a case of that kind what was the duty of the conductor?

[fol. 247] Mr. Walker: Under the rules you mean?

By the Court: Yes.

Mr. Norvell: If an engineer for any reason, as I have said, whether through negligence, stroke or anything else, in violation of an order, or in violation of the rule requiring him to give way to a superior train, runs out on that single main track, what is the duty of the conductor?

A. To stop the train.

Q. How can a conductor stop the train, a passenger train now I am talking about?

A. Well he can signal the engineer to stop it one way.

Q. And he can angle cock it the other?

A. And he can angle cock it the other way, the conductor's valve.

Q. Now Mr. Gibbons on your passenger trains the engineers show or give the orders to the firemen, don't they?

A. Yes, sir.

Q. And the conductors show or give the orders to the flagman don't they?

A. Yes, sir.

Q. On your freight trains the conductors give the orders to the [fol. 248] brakeman instead of the flagman?

A. Yes, sir.

Q. Confine this to passenger trains though, when an order is shown to the fireman as to what number a superior train is, and the train for any reason is run by the engineer, or is allowed to run in violation of that order before it is ascertained that the superior train has passed, on to the main track, what is the duty of the fireman?

Mr. Walker: I object to that because there was no proof that the fireman was given orders, and you can't ask a question assuming a a fact that has not been proven.

Mr. Norvell: In this case Mr. Kennedy and the fireman are both dead and the jury -as the right to infer, and in asking the question I have the right to assume, asking an expert witness like this, either theugh the order was or was not shown to the fireman, it is a matter for the jury.

Mr. Walker: When there is some proof to that effect I agree to that, but he just assuming, may it please the Court, that this order was given to the fireman and that the fireman knew all about it when there is no proof on earth about it.

[fol. 249] Mr. Norvell: You are assuming it wasn't given to him.

Mr. Walker: I know, but the burden is on you though.

Objection sustained.

Mr. Norvell:

Q. Now Mr. Gibbons, where an order has been shown to the flagman and the train proceeds on out to the single track before it has been ascertained that the superior train is by, the engineer and conductor for some reason allowed the train to do that, what is the duty of the flagman?

A. It is his duty to stop the train too.

Mr. Walker: I object to that unless he puts in there under the rules.

The Witness: Yes, under the rules, that is what I mean.

Mr. Norvell:

Q. State whether or not it is his duty under the practice of running the road to call the conductor's attention to the fact that the superior train is not there?

[fol. 250] A. He generally would do that.

Objected to and overruled. Defendant excepted.

Q. I say, is that the practice for him to do it?

A. I really don't know what the conductors practices are, but that is what the fireman would do, he would call my attention to it.

Q. Do you know what it is with regard to the flagman?

A. I know what his duty would be, but I don't know whether he would do that or not.

Q. You know what his duty would be? Now Mr. Gibbons the N. & C. runs going Northwest from Nashville to St. Louis—doesn't the N. & C. train run from Nashville to St. Louis?

A. From Nashville to Hickman.

Q. Your furthest run is as far as Hickman?

A. Yes, sir.

Q. Now Mr. Gibbons, when you are leaving the station here going out on the Northewestern, what is the usual condition of those yards

down there as to whether there are other trains in there, other engines, such as switch engines and so forth moving around,—as you leave the Union Station you are in the yard?

A. Yes, sir.

Q. It is some distance before you get on the main track, until you leave the shop, I mean on the single track

[fol. 251] A. Yes, sir.

Q. How many tracks are there approximately in the yards there around the Union Station?

A. I really don't know, a good many.

Q. A good many aren't there?

A. Yes, sir.

Q. Now then, after you cross Cedar Street you take a trestle, don't you, on the Northwestern?

A. Take what?

Q. After you cross Cedar Street going out on the Northwestern you travel on a trestle as far as the packing house?

A. It is not a trestle, it used to be a trestle. It is filled.

Q. It is a curve?

A. It curves to the left.

Q. A fairly good curve isn't it?

A. Yes, sir.

Q. The engineer is supposed to be where, on the right or left of the cab?

A. On the right.

Q. To identify a train passing on the other side on a curve, does the engineer not have to largely depend on his fireman?

Objected to what other engineers do, and what he has got to do.

Q. Can the engineer see without great difficulty?

[fol. 252] A. Not on a curve.

Q. See the number of a train passing on a curve?

A. Not very good on a curve.

Q. What does the engineer show his fireman a copy of the order for?

A. To help him protect the train, help him to carry out and follow that order.

Q. Then when you strike the packing house going on down toward the shops there are five or six tracks in there, aren't there, at different places?

A. Yes, sir.

Q. Now Mr. Gibbons, when you leave the shop tower a short distance, you then get on to the single main track, don't you?

A. Yes, sir.

Q. Just tell us please about the grade, do you strike a grade there?

A. You are going up grade after you leave the shop yard there and then you start down the grade.

Q. When do you start down?

A. Just after you leave the shop yard across the T. C. Crossing there.

Q. You say you start down grade?

A. You start down grade.

Q. And that grade continues with reference to what place in regard to this accident?

A. Right along where the accident was.

Q. Right along where the accident was is about where

[fol. 253] Q. Right along where the accident was is about where that grade stops?

A. Yes, sir.

Q. Now the train that was coming toward this train, No. 1 coming from Hollow Rock what is the condition of the grade, is it open level ground or is it up and down hill?

A. It is ascending a little bit, but he comes off of a grade, before you get to Harding, and then it is a little bit down grade until you get to where they hit at.

Cross-examination.

By Mr. Walker:

Q. Are you a passenger or a freight engineer?

A. Well, I am considered a freight engineer now.

Q. Did you ever pull train No. 4?

A. Yes.

Q. What was the last time you pulled that?

A. It has been some time, I reckon six or seven or eight years.

Q. You pulled that as an extra engineer?

A. Yes, sir.

Q. You didn't have that as a regular run?

A. No, I was an extra passenger engineer.

Q. Did the train leave at that time at seven o'clock from the Union Station?

[fol. 254] A. Just about seven, all the time since I have been on the railroad.

Q. Did you generally meet train No. 1 at that time between the shops and the Union Station?

A. Well, we met it from the shops to the shed.

Q. From the shops to the shed?

A. Yes, sir.

Q. You at that time were given an order identifying the engine number on Train No. 1, were you not?

A. I don't remember whether we had that order or not, it is the custom to have an order like that though.

Q. It is the custom to have an order like that?

A. Something like that.

Q. And there was a double track from the Union Station to the shops?

A. Yes, sir.

Q. And unless the engineer had personal knowledge that train No. 1 had arrived from Hollow Rock and he had passed it at some place between the shops and Nashville, when you got to the shops irrespective of how the signals were at that place, whether at stop or

whether at proceed you always stopped and ascertained beyond a doubt that No. 1 had arrived, didn't you?

A. That was your duty.

Q. And that was the duty of the engineer, wasn't it, to have personal knowledge that No. 1 had arrived from the direction of Hollow [fol. 255] Rock and he in off of that single track before you went on it, is that right?

A. Yes, sir, we are supposed to find out.

Q. The reason of that was that No. 1 was a superior train and had the right of way to the main track, that is right, isn't it?

A. Yes, sir.

Q. When train No. 4 stands in the station at the Union shed, of course there is a fire in it, isn't there?

A. Yes, sir.

Q. And there is a great congregation of people as a general rule around there at the depot and around the trains and on board here in Nashville, is that right?

A. Yes, sir.

Q. Now the firemen are required to keep the fire in the engine low so as not to make any more smoke than is absolutely necessary at that point?

A. That is their instructions, yes, sir.

Q. So the fire in those trains gets rather low while they are in the station and before they pull out, is that right?

A. I don't know what you call low, they keep them in condition so they can leave and to keep enough steam up.

Q. You just keep enough necessary at that point and at that time to pull out?

A. Yes, sir.

[fol. 256] Q. And then shove the coal to it after it gets out?

A. Yes, sir.

Q. Now the effect is when you put in coal on this green fire that smoke commences to come off and you have a lot of it after you leave the station?

A. Sometimes you have a good deal.

Q. Now isn't it a fact that it is somewhat up grade from the Union Station until after you get past and beyond the shops?

A. No, it is inclined to be down grade until you get to the packing house and then it is up grade.

Q. How far is it from the Union Station to the packing house?

A. I don't really know the distance, a quarter of a mile I reckon or a little over from the Union Station to the packing house.

Q. Then from the packing house on to past the shops it is up grade?

A. Yes, sir.

Q. What is the fireman doing along there, shoveling coal, isn't he?

A. Well, that is one of his duties.

Q. You say he — got to shovel coal along there?

A. Yes, sir.

Q. In order to get the steam to get the train to go?

A. Yes, sir.

Q. Where is the engineer at that time, on the lookout, isn't he?
[fol. 257] A. He is supposed to be looking out all the time.
Q. Looking out ahead?
A. Yes, sir.
Q. And there is only one place that the engineer can't at all times see an approaching train and that is when he is on the outside of a curve, is that a fact?
A. Yes, sir.
Q. He has the best opportunity of anybody then to see what an approaching train is, hasn't he, and he is on the lookout ahead?
A. No, the fireman has got just as good a lookout as he has.
Q. While the fireman is shoveling coal?
A. He is not supposed to be down at the fire box all the time, he can see a distance and fire between that distance and where he has seen.
Q. But if a train happens to pass while the fireman is throwing in coal he couldn't necessarily see the engine number because he is busy at something else?
A. No, sir.
Q. These engine numbers such as engine No. 281 has, they are about ten inches high, are they not?
A. About ten or eleven inches high I reckon.
Q. And then about how wide are they?
A. A little over twice that wide, you mean just the one figure?
Q. No, what I mean by that is the three figures painted about the
[fol. 258] same distance?
—. ——.
Q. Is that on the engine or on the tank?
Q. On the engine.
—. ——
A. That is about that long, about twelve or fourteen inches.
Q. About fourteen inches wide the three numbers are together, and then each of the three numbers, both the two and the eight and the one are about ten inches high?
A. Yes, sir.
Q. Now those numbers are right on the front part of the boiler, are they not?
A. Yes, sir.
Q. And the boiler is a black color, is black, that is a fact?
A. Yes, sir.
Q. And the colors of the numbers is brass or golden shade?
A. Yes, sir.
Q. The colors of the numbers are brass or golden color?
A. Yes, sir.
Q. How far is it from that cut that you told Mr. Norvell about this side of that bridge in fact to the bridge?
A. From the cut to the bridge?
Q. Yes.
A. Well, I would say it is about 450 feet, I wouldn't know, I never
[fol. 259] did measure it or nothing like that, four or five hundred feet, something like that.

Q. You enter the cut on a curve or on a straight or not?
A. It is kind of coming around a curve.
Q. What degree curve is it?
A. I don't know.
Q. Well, a two per cent curve?
A. I can't say.
Q. You don't know about the per cent.
A. No, sir.
Q. How far back on an engine can you see this bridge about the track as you leave Nashville going in the direction of Hollow Rock?
A. I can't answer that either, I don't know.
Q. About how many hundred feet?
A. You might see the top of the bridge away back there, I never did notice particularly.
Q. I mean following the line of the railroad track, the line that the engine pursues or follows?
A. I can't answer that because I wouldn't know.
Q. You were asked something about whether or not the undergrowth near the bridge prevented you from seeing?
A. That is part of the track, you keep your eye on the track.
Q. I am talking about on the track, how much higher is that bridge than an engine, how much clearance is there between the top [fol. 260] of an engine and the bridge?
A. That is a good distance, I don't know that either. I know that it will clear a man good on a car, away yonder.
Q. About ten or twelve feet clearance?
A. Yes, sir.
Q. So then that bridge don't keep an engineer from seeing what is in between the track, does it?
A. Not the top part of it, no, sir.
Q. Now another thing I want to ask you about, train No. 1 I believe you have said was a superior train because it was a south bound train?
A. A south bound train, yes, sir.
Q. And therefore it had the right to the main track?
A. Yes, sir.
Q. While you were pulling No. 4, under the practice and under the rules, if No. 4 was given an order that No. 1 had engine No. 281 and you got to the shops and hadn't passed No. 1, irrespective of whether the signal at the shops showed the proceed sign, that is to say, it showed that the switches were lined up for you, or whether it was at stop, No. 4 comes to a stop, don't it.
Mr. Norvell: Are you proceeding under both the practice and the rules or not. If you are I don't object, if you are not——
[fol. 261] Mr. Walker: We are proceeding under the rules and the practice. The reason you got confused about that I asked Mr. Templeton to turn to the rule that governed such a train as No. 4.
A. Yes, sir.
Q. Then, in other words, all that those signals mean there at the shops, if the signal showed a proceed sign to the engineer operating No. 4, was that if he had an order to go by the shops without having

identified No. 1, then the switches were thrown for him to do that, wasn't it?

A. Yes, sir.

Redirect examination:

Q. Mr. Walker asked you some questions about the only time that an engineer couldn't see going out on this road was where he was on the outside of a curve, I think he was referring to that curve leading from Cedar Street, suppose it is on a curve in a cut, does he have an interference there, if the cut is high enough, does that interfere with him looking ahead on the track on a curve in a cut?

A. He couldn't hardly see it then probably.

Q. Now Mr. Gibbons I believe you were asked whether under the rules and practice the engineer should have gone out on the track, no [fol. 262] matter what the signals were at the shops, until he was sure that the superior train had passed, and you answered that that was correct, I will ask you also under the rules and practice should the conductor under those same circumstances have allowed the train to go out on that same track unless he was sure the superior train was in?

A. The same applied to the engineer applied to the conductor.

Recross-examination:

Q. You don't know anything about the understanding and agreement, what it was, between engineer Kennedy and any other conductors as to him looking after the train?

A. He couldn't assume any responsibility.

Q. You don't know about any understanding about that?

A. I am talking about the rules.

Q. I know you are and I am talking about something else?

A. He couldn't put any responsibility of Mr. Kennedy that the Company put on him.

Q. I didn't ask you about what he could do and what he couldn't do, what I asked you was if you knew anything about that?

A. No, I wasn't there at all and I don't know anything about it.

[fol. 263] Re-re-direct examination:

Q. Was it the practice and would the company tolerate one man shoving responsibility under the rules on another?

Objected to.

Q. I will put it this way, was it the practice of the company to permit the rules to be obviated by any private understanding between members of the train crew that somebody else was to assume their responsibility?

Objected to as incompetent and sustained.

Further this deponent saith not.

[fol. 264] W. S. HAILEY, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. What is your position?
A. Engineer.
Q. On what road?
A. N. C. & St. L.
Q. How long have you been an engineer Mr. Hailey, approximately?
A. I was first set up in 1911. I have been back firing several times since then.
Q. Prior to 1911 did you fire?
A. Yes, sir.
Q. For about how long?
A. I started firing in March 1902.
Q. Mr. Hailey, did you ever fire for Mr. Kennedy?
A. Yes, sir.
Q. When was the last time you fired for him?
A. I think the last time I fired for him was in the first half of January, 1918.
Q. Now going on back and taking the different times you did fire for him, about how much did you fire for him altogether?
A. I should judge about four, maybe five years.
[fol. 265] Q. Of course you knew him pretty well when you were firing for him, after you quit firing with him and in between times did you know him very well?
A. I expect when I was firing with him that I was with him more than anybody, but after I left him I would see him about like any other man.
Q. You saw him frequently?
A. Yes, sir.
Q. Mr. Hailey what was Mr. Kennedy's health and vigor at the conclusion of his life?
A. His health was good.
Q. What kind of a man was he physically and as to his ability to get around and appearance?
A. He looked to be a whole lot younger than he was, that is, from his actions, a very vigorous man for his age.
Q. Much more so than the ordinary man.
A. Yes, sir, he was about as supple as I was.
Q. Mr. Hailey, have you ever run on the northwestern division.
A. Yes, sir.
Q. Now, Mr. Hailey, let me show you a picture here, which is marked Exhibit No. 1 to Eubanks testimony, and which purports to show where this wreck occurred, by the way did you see the wreck after it happened?
A. Yes, sir, I seen it that afternoon.

Q. You know where it was?

[fol. 266] A. Yes, sir.

Q. This picture purports to come from the direction No. 1 was traveling, in other words, this was coming to town, now No. 4 coming this way, and this mark has been identified where this steam is about where the wreck happened. Now as No. 4 comes around from town approaching this concrete viaduct here, is there any cut back in there or not?

A. Yes, sir this wreck, these engines were lying just about half way between this viaduct and this cut, on top of this cut there used to be a bridge, an overhead bridge.

Q. Now beyond where the wreck occurred, if you were going out, as this picture is there in this concrete bridge that is shown here which goes over to the catholic orphanage?

A. Yes, sir.

Q. You were referring to another bridge back here?

A. Yes, sir, before this one was built.

Q. That cut, how deep a cut is that Mr. Hailey, do you know about?

A. Well, I don't know it is about,—it is up above the top of the cars.

Q. Are you on a curve there to in that cut coming out of it?

A. I think it is, I would — be sure, I think that is on a curve, if it is not it is right at the end of the cut.

[fol. 267] Q. Mr. Hailey, do you run on a passenger train or a freight train?

A. I run a freight engine, both divisions.

Q. Did you ever run a passenger?

A. One or two trips.

Q. Just extra.

A. Extra.

Q. You have run though as fireman on a passenger train very frequently?

A. Yes, sir.

Q. And you frequently run on the Northwestern Division as fireman on a passenger train?

A. Yes, sir.

Q. Mr. Hailey I will ask you whether or not it is not only the rule but the custom for the engineer to show his fireman his train orders?

A. Oh, yes sir.

Q. Mr. Hailey is it or not the duty of the fireman to assist the engineer in the observance of those train orders by looking out for superior trains?

A. That is what he shows him the orders for. If the engineer goes to overlooking his hand to call his attention to it.

Q. That is the practical purpose for which the order is shown to the fireman, isn't it?

A. Yes, sir.

[fol. 268] Q. Do you know what the custom and rule, if any there

is, as to the conductor showing his orders to the flagman on a passenger train?

A. Oh, yes, the rule is that he must show his order to the flagman.

Q. Is it the duty of the flagman to assist the conductor in the observance of orders?

A. Sure, to keep these orders in mind.

Q. In running a train what does the engineer generally have to do?

A. You mean take care of it?

Q. Yes.

A. The first thing he has to do is to inspect his engine before going out and oil it and see that there is water in the boiler.

Q. After he starts?

A. Before he starts and to find out whether he has got a right to start.

Q. After he starts what are his duties then?

A. To keep clear of all superior trains, keep water in the boiler and keep a lookout ahead.

Q. Operate a lever there?

A. Yes, sir, he has several levers and air brakes.

Q. In regard to ringing the bill and blowing the whistle, has he any duties there?

A. Yes, sir, it is his duty to blow the whistle and there is an air bell ringer, the bell also has a cord on it on the fireman's side and [fol. 269] it runs to his side.

Q. Suppose anything goes wrong with the engine there, not such a fatal trouble as that you have to stop the engine, is it the duty of the engineer to see that that is fixed?

A. To see that it is fixed?

Q. Yes, to look after its repairs if it is something that can be done there on the run?

A. Yes, sir, he must do it if he can.

Q. In running a train the engineer we will say is looking forward, that he is inside of the cab, what is in front of him a glass window, in other words, that is what I am getting at.

A. Yes, sir, there is a glass door in front.

Q. Frequently on those engines there is an arm rest on the window they generally keep open by his side?

A. Yes, sir.

Q. And frequently the engineer is leaning with his head out?

A. Yes, sir.

Q. Frequently it is the custom to lookout where there is nothing between you, or looking through the glass window where you don't put your head out?

A. Yes, sir and sometimes when you get your head outside you [fol. 270] have a wind shield.

Q. Sometimes?

A. Yes, sir, you can use it on all engines.

Q. Now Mr. Hailey the engineer is ordinarily presumed to be on the lookout, that is part of his duty, isn't it?

A. That is part of his duty.

Q. If he has to be engaged for a moment in trying to fix something, or something of that kind, what is the duty of the fireman as to being on the lookout?

A. You mean if he is not on the lookout.

Q. The rules require one of them to always be on the lookout?

A. Yes sir.

Q. The fireman's main duty, I mean his physical manual duty is shoveling coal into the engine?

A. Yes, sir, and when he is not doing that he is supposed to be looking out too, both of them.

Q. Shoveling coal don't take up all of his time?

A. It takes up a right smart of it.

Q. I say, it doesn't take up all of his time?

A. No.

Q. He generally shovels a pretty good quantity of coal and then closes his fire door and then is on the lookout, is that right?

A. Yes, sir.

Q. Now, Mr. Hailey, suppose a train is passing with six or seven [fol. 271] coaches, and by the way, I will ask you whether or not No. 1 didn't generall- run with six or seven coaches?

A. I don't know the size of the train, from five to seven.

Q. It is a through train generally with Pullman cars?

A. Yes, sir.

Q. The pullmans are a little heavier than the ordinary coach?

A. Yes, sir.

Q. When two trains are passing right on adjoining tracks an experienced railroad man doesn't have to physically see the number of the engine to tell whether an engine has simply passed him or whether an engine with five or six coaches and one or two heavey pullmans have gone by has he, isn't there a noise there?

A. Yes, sir, there is a noise all the time the train is passing.

Q. Isn't there quite a difference?

A. In a light engine and train you mean?

Q. Yes, sir.

A. Oh yes.

Q. It is such a difference that even an ordinary layman and not even an experienced railroad man could?

[fol. 272] Objected to — leading.

Q. Is there any difference in the sound?

A. The length of the sound is longer.

Q. Now, Mr. Hailey, of course it is the duty of an engineer to see that superior trains are passed.

A. Sure.

Q. Now Mr. Hailey, what is the duty of the conductor in that regard?

A. To see that a superior train has passed?

Q. Yes.

A. The same as it is the engineer's.

Q. What is the duty of the flagman, particularly if he knows that

the conductor is quite busy as to ascertaining the passage of superior trains?

A. It doesn't matter whether the conductor is busy or not.

Objected to as calling for a conclusion.

Mr. Norvell: A custom or practice that does not contradict the rule can be introduced in evidence, now that is clear Mr. Walker was asking Mr. Templeton about all kinds of duties.

Mr. Walker: Outside of the rules.

[fol. 273] Objection overruled and defendant excepted.

Q. What is the duty of the flagman as to noticing whether or not superior trains have passed after he has seen a copy of the order particularly when he knows the conductor is busy?

A. It is his duty to see that this train has passed.

Q. And then if it has not passed and it goes into the single track or the superior track in the face of the superior train what is his duty then?

A. He must stop him before he gets to the single track if he can get to the conductor in time, if not stop him himself.

Q. Mr. Hailey you have stated that the fireman is given a copy of the order generally?

A. Yes, sir he is shown the engineer's copy.

Q. By the engineer?

A. Yes, sir.

Q. Now, Mr. Hailey when the engineer does not for some reason, or when the engineer fails for some reason to observe the passafe of a superior train what is *it* the duty of the fireman if any?

A. And the superior train has not arrived?

Q. Yes?

A. He must notify and tell the conductor that he has orders to meet this train, or he has no time to notify him, of course, if the [fol. 274] time is short, to stop the train.

Q. If the engineer for any reason is incapacitated state whether or not it is his duty to stop the train, the fireman.

A. Sure, yes, he could stop it.

Q. Just one other question, Mr. Hailey, did you ever know Mr. Kennedy in his home life?

A. I have been to his home once.

Q. Just once?

A. Yes, sir, just once.

Cross-examination.

By Mr. Walker:

Q. You say it was the duty of the engineer to lookout for superior trains, that was one of the duties, is that right?

A. Sure.

Q. No. 1 was a superior train, wasn't it?

A. Yes, sir.

Q. No. 4 and No. 1 collided didn't they?
A. Yes, sir.
Q. You said something about the duty of the flagman to look out after the train, will you find anything in this rule book on that subject.
A. There is a rule in there.
Q. Just find it in there will you on that point. Are you certain that a rule like that is in that book.
[fol. 275] A. There is a rule in this book for the conductor to show his orders to the flagman.
Q. Well, I understand that, we agree about that, there is also a rule in there that the engineer must show his orders to the fireman?
A. Yes, sir.
Q. That is true, but there is no direct order in there that the flagman must stand there or must look out after a train, there is no direct order on that?
A. No, there is no direct order, but that is the idea in showing him these orders.
Q. That is your idea?
A. That is our instructions by the train rule examiner, if he goes to overlook it call his attention to it.
Q. You are not a flagman?
A. No, sir.
Q. You are not a fireman?
A. An engineer.
Q. You are at work about your duties at the front end of it?
A. Yes sir.
Q. What does the flagman do, what are his other duties?
A. He has to protect the rear end of the train.
Q. From any following trains?
A. Yes, sir.
[fol. 276] Q. And the engineer and fireman are on the front and the engineer is always on the lookout ahead, isn't he supposed to be?
A. Yes, sir, he is supposed to be and the rule says one of them must be.
Q. Must be on the lookout ahead?
A. Yes, sir.
Q. The conductor is back in the coaches, of course?
A. That is right.
Q. It is up grade from the packing house to the shops, isn't it?
A. Yes, sir.
Q. When you are pulling a passenger train, or firing a passenger train, after you leave the station you commence to build up your fire, don't you?
A. I generally when I was on that run would start to fire and would be through by the time I passed Church Street, that is, straightening the fire out.
Q. What train were you operating?
A. I was on train No. 4 with Mr. Kennedy.
Q. When did you run on that?

A. The last firing I did on that I think was the first half of January 1918.

Q. What run are you on now?

A. I am running extra both divisions.

Q. On the Nashville Division and Chattanooga Division?

[fol. 277] A. Yes, sir.

Q. How many runs did you make with Mr. Kennedy?

A. You mean all together?

Q. No, 1918, if you recall?

A. Not over a half a dozen, I don't expect that many for the first half of January when I left the run.

Q. Between the Union Station and the shops there is only one curve, isn't there?

A. There is only one big curve, but there is another curve up there by the Clifton Pike.

Q. Up where?

A. About Ransom's Lumber Mill.

Q. That is a very small curve.

A. Yes, sir.

Q. But this curve that you say is a large one that is right near the Union Station between Broad Street and the packing house?

A. It is right at the packing house.

Q. Now how far is it from the packing house to the shops?

A. About a mile and a half.

Q. Did you go out to the scene of the wreck?

A. I was out there in the afternoon on the day of the wreck.

Q. You didn't go out there right after it happened.

A. No, sir.

[fol. 278] Redirect examination:

Q. One question I forgot to ask, Mr. Hailey running a passenger train have you ever made any observations as to the space it takes to stop a train running at dufferent speeds, with a passenger train with six or seven coaches?

A. In what?

Q. I say, in your life as an engineer of a passenger train have you ever made any observations say on a level track the approximate stops within which an average train may be stopped, by average train I mean one of five or six or seven coaches at different rates of speed on a level track.

A. Yes, sir, there is different ways to brake, you can brake with a heavy reduction or light reduction, or heavy emergency.

Q. I understand, say a train is going thirty or thirty-five miles an hour on a l-vel track with five or six coaches about what space can that train be stopped?

A. In emergency?

Q. Yes, I want you to give the different phases you have mentioned?

A. I don't know, some trains are heavier than others and it takes longer to stop some than others.

[fol. 279] Q. Take a train of five or six coaches, possibly one a steel coach and the others wooden passenger coaches, and of course your tender and engine, you have named three different methods of stopping, you called one emergency, what was that?

A. There is two service, I said light reduction and heavy reduction, you can draw off a little amount of air and space your stop making a long stop, if there is nothing in the way, going to stop at a station.

Q. Suppose you are going thirty or thirty-five miles an hour and make a light reduction, how long would it take to stop your train?

A. I don't know what you mean by a light reduction, we are instructed to stop with those passenger trains to make about a twenty pound reduction, that is a pretty heavy reduction.

Q. Within what space will it stop.

A. I don't know.

Q. You never did observe?

A. We have to make a second reduction, it makes a jar on the brake and we have to make a second reduction to stop.

Q. What space can you stop a train running thirty or thirty-five miles an hour?

A. You can stop one say between here, and what is the name of this street, Fourth Avenue or Third?

Q. That is Third Avenue.

A. You can stop one down to Third Avenue.

[fol. 280] Q. About eight hundred feet?

A. Yes, sir.

Q. Suppose you have got a train going fifty miles an hour, how would it increase that?

A. Making a service stop.

Q. No, an emergency stop?

A. You would commence sooner further back, our instructions to stop is to make a heavy reduction, reduce the speed of the train to about fifteen miles an hour and release them in order to do away with the jary of the train and make a later reduction.

Q. What I am getting at is, from the time you start to applying your air until you stop, I mean covering the different phases of stopping you have to go through you say you would have to start sooner, I presume you would cover more space running fifty miles an hour?

A. Yes, sir.

Q. How much more space would you start?

A. Say a hundred feet further back.

Q. About nine hundred feet.

A. Let me explain all of that.

Q. I wish you would.

Q. When we see the distance we are going to stop we don't know how far it is in feet, we know about how to brake in stopping. Another thing, you can't judge the number of feet running along [fol. 281] there. We never look to anything of that kind. Of course if you go out to make a test you could get all of these things.

Q. You are giving what your idea is?
A. Yes, sir.

Further this deponent saith not.

[fol. 282] W. P. JOHNSON, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. Mr. Johnson, you are on the police force of the city of Nashville?
A. Yes, sir.
Q. You knew Mr. D. C. Kennedy for a good many years before his death, didn't you?
A. Yes, sir.
Q. How well did you know him Mr. Johnson, were you one of his good friends or a casual acquaintance?
A. I knew him intimately.
Q. Mr. Johnson, at or about the time of his death please state to the Court what was Mr. Kennedy's health and physical vigor, particularly for a man of his age?
A. Fine.
Q. What was his ability to handle himself and to get around and to walk and move?
A. Good.
Q. To a casual observer, to a man who hadn't known him for years did he appear to be a man of seventy-two years of age?
[fol. 283] A. He didn't get about like a man generally would of that age.
Q. You mean he got about better, more like a younger man?
A. Yes, sir.
Q. Did you ever know Mr. Kennedy to have any serious ailment or disability?
A. No, sir.
Q. Did you ever know him to be sick with any serious matters at all?
A. No, sir.
Q. Was he a man at that age of life who was generally on the job and around or was he a man who laid off frequently?
A. He was always on the job so far as I know.
Q. You were with him frequently, were you not?
A. Frequently, yes, sir.
Q. Mr. Johnson, you used to play cards with Mr. Kennedy, did you not sometimes at Mr. Geary's?
A. Yes, sir.
Q. It was a perfectly lawful game, we will assume?

A. Yes, sir, we used to have a sociable game of euchre, and he would come to my house and I would go to his.
Q. Now his ability to see the cards was all right, was it?
A. Yes, sir, he was all right.
[fol. 284] Q. And age hadn't dimmed his ability to see?
A. He was a mighty hard man to beat sometimes.

Cross-examination.

By Mr. Walker:

Q. Could see a jack pretty good long ways when he had something to catch it.
A. Yes, sir.

Further this deponent saith not.

[fol. 285] Monday, October 23, 1920.

Mr. Norvell: May it please the Court there seemed to be a little confusion about distances, Mr. Walker putting in proof on cross examination of Mr. Eubanks a view looking from the direction No. 1 was coming, and in examining some other witnesses Friday there seemed to be a good deal of confusion as to the exact distances, so Saturday afternoon I asked Mr. Jones to go out and make some measurements and have a couple of pictures taken and I would like to put him back on the stand and prove the measurements and these pictures.

By the Court: All right call him around.

W. G. Jones, recalled by the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. Mr. Jones, I will ask you whether this last Saturday after-
[fol. 286] noon you went out with some of the rest of us and made some measurements at the scene of this wreck?
A. Yes, sir, I did.
Q. Now, Mr. Jones, I *have* you this photograph and will ask you in what direction that is looking, looking from the camera what direction is that?
A. Looking from that bluff toward the bridge.
Q. In other words in the direction No. 4 was coming?
A. Was, going, yes sir.

By the Court: Looking West or Northwest.

A. Yes, sir, the way he was going.

Mr. Norvell:

Q. Does that correctly represent the view from just behind that rock in the cut looking with the track as it goes west or northwest?

A. Yes, sir.

Q. Will you kindly file that as Exhibit No. 1 to your testimony?

A. Yes, sir.

Q. Now Mr. Jones another photograph I just handed you, what direction is that looking?

A. That is from the concrete bridge looking toward Nashville in the direction No. 1 was coming east.

Q. Is that from right on the track at the concrete bridge or at [fol. 287] the top of the concrete bridge?

A. It is from the top of the concrete bridge.

Q. Will you file that as Exhibit No. 2 to your testimony?

A. Yes, sir.

Mr. Norvell: I passed to the jury first the picture showing the direction No. 4 was going and next Exhibit No. 2 showing the opposite direction.

Q. Now Mr. Jones, did you assist in making some measurements out there Saturday and were you present and saw them made?

A. Yes, sir, I did.

Q. Now Mr. Jones I believe you had stated previously to this on the stand that you were out there a short while after the wreck happened that morning and knew where the engines laid and the collision occurred?

A. Yes, sir.

Q. Now, Mr. Jones, starting from the east side of the concrete bridge, how far was it down the track measuring along the outside rail to where the engines were piled over there. In other words, your recollection of where they were piled where the collision occurred?

A. 250 feet.

Q. That is from the concrete bridge going——

[fol. 288] A. From the concrete bridge coming in.

Q. From the concrete bridge to the west edge of the cut or rock on the north edge of the cut, how far was it from the concrete bridge?

A. 555 feet.

Q. Now that west edge of the cut or the north side was a rock cliff as shown in the photograph?

A. Yes, sir.

Q. How far was it from that concrete bridge to the east edge of that rock cliff?

A. 696 feet.

Q. In other words, those projecting rocks there then extended along the track and down between the distance of 655 and 696 feet or 41 feet?

A. Yes, sir.

Q. Did you measure from the top of that rock in the cut down to the ground in the gulley?

A. Yes, sir.
Q. What was the vertical height of that?
A. From the top of the rock to the ground 17 feet 10 inches.
Q. From the top of the rock to a point even with the top of the track how much was it?
A. 16 feet 5 inches.
Q. In other words the top of that rock was 16 feet 5 inches higher than the track and 17 feet 10 inches higher than the ground?
[fol. 289] A. Yes, sir.
Q. Mr. Jones, the place marked for the position of the camera what distance was that from the concrete bridge?
A. You mean the first position?
Q. No, I mean from the concrete bridge going east how far was it from the place marked for the camera?
A. 716 feet.
Q. Mr. Jones, how far is it from the top railing of that concrete bridge pier, that r-iling is solid?
A. Yes, sir, it is concrete.
Q. How far is it from the top railing of that concrete bridge to the track bed?
A. 30 feet and 6 inches.
Q. That is the vertical height*h*?
A. Yes, sir.
Q. Now Mr. Jones, there is exhibit No. 1 in front of you looking toward the concrete bridge in this westerly direction as the track goes on beyond the concrete bridge in which direction does it curve?
A. It curves to the right.
Q. Or toward the northwest?
A. Yes, sir.
Q. Now from what direction is the curve incoming as you go up behind that rock cliff coming with No. 4?
A. Let me understand that.
Q. As you were going with No. 4, in other words, from the town [fol. 290] out and coming out from behind that rock cliff on that curve in what direction does the curve go?
A. Going to the right.
Q. In other words, Mr. Jones, if you could find the center of your circle back toward the north beyond the orphan asylum there, and run a radius or string down to this concrete bridge, you would be at the top of your circle would you not, in other words, it curves as you went out?
A. That is right.
Q. Comes in or towards the north as you come on it comes in or toward the north?
A. Yes, sir.
Q. Now Mr. Jones, these measurements were taken while you were there?
A. Yes, sir.
Q. And the place was marked for the camera in the cut and on the bridge?
A. Yes, sir.

Q. And then you were not there when the picture itself was taken just a little later?

A. No, sir.

Q. That does correctly represent the view over there?

A. Yes, sir.

Q. I will put the other man on who was present. Now Mr. Jones standing back there in that cut just a few feet back of that rock [fol. 291] ledge, or 716 feet from the concrete bridge, as you have stated, can the track be seen any further than the concrete bridge for any appreciable distance?

A. No, sir, it couldn't.

Q. Now even standing up on the concrete bridge and looking toward town or east, I believe you stated the concrete bridge was something over 30 feet high?

A. Thirty feet and six inches.

Q. Considerable high- than where the engineer is in the cab of the engine?

A. Yes, sir, considerably higher.

Q. In looking east towards town could you see any appreciable distance beyond these rock- in the cut?

A. No, sir, you couldn't.

Q. The view of the track is shut out except for just a short distance?

A. Just a short distance in the cut.

Cross-examination.

By Mr. Walker:

Q. This picture which has been filed as Exhibit No. 1 to your testimony, which was taken at a time when the camera was facing west or facing looking toward the concrete bridge, or facing in the direction that No. 4 was going that morning, in the direction of [fol. 292] Hollow Rock, was taken how far east of the west end of the bluff.

A. I will have to subtract that and see, from the concrete bridge to the west end of the cut or bluff 655 feet, from the bridge to point where camera was placed 716 feet, that would be 46 feet, wouldn't it, no worse than that, it is 61 feet.

Q. Now if the camera had been 61 feet further in the direction of Hollow Rock, or at the west end of this cut, you could also have seen to the bridge and past the bridge, and have seen all of the territory that is covered in Exhibit No. 2 which is on the West side of the bridge in the direction of Hollow Rock, couldn't you?

A. You mean if the camera was placed at the edge of this cut and faced towards the bridge, yes, you would have gotten all of that track, certainly.

Q. You would have gotten all the track and gotten the bridge and cotten also west of the bridge?

A. For a little piece.

Q. Would you not just as far as the camera would take a picture?

A. No, sir, the track curves too much, you couldn't have gotten it that far.

Q. How far could a man see at 61 feet west of where the camera [fol. 293] was standing, or standing at the west end of that cut looking west in the direction of that bridge past the bridge?

A. He probably could have seen a little piece beyond the bridge through the bridge.

Q. How far?

A. I wouldn't like to say exactly the distance, but he would probably see several feet on the other side, but not very far because the track is on a curve on the other side of the bridge.

Q. The track curves to the right, doesn't it?

A. Yes, sir.

Q. The engineer is on the right hand side, isn't he?

A. Yes, sir.

Q. Now I show you Exhibit No. 1 to the testimony of Mr. Eubanks, being a picture which was taken looking in the direction of Nashville and on the east side of the bridge and showing some smoke or steam escaping from a point on the west side of the bridge, you could have seen the distance shown in this picture from the west end of the bluff to the point where this camera was taking this picture?

A. I don't believe you could, no sir, the other way.

Q. You can see the thing here one way as good as you can the other?

A. Yes, but you can't see the track where this picture was taken on the other side of the bridge.

Q. Why, not?

[fol. 294] A. There it is.

Q. Don't the picture show for itself you can?

A. It don't the track.

Q. It don't show exactly the rail but it shows the general vision?

A. Yes, it shows the general vision, but you were talking about the track.

Q. I wasn't talking about the cross ties and rails but the general vision, the right of way in between the fences?

A. You can't see very far in between the fences looking the other way, not very far from where that camera was.

Q. How far standing at the west end of the bluff looking in the general line of vision, not looking at the cross ties and rails but looking in the general direction of the track, how far could you see beyond the bridge.

A. Maybe twenty feet.

Q. How is it that you can see to the bridge and yet can't see over twenty feet beyond the bridge, suppose this bluff here was not in the picture, but you were standing at the west end of the cut, how far up beyond that bridge could you see?

A. You couldn't see very far, you could see the sky up through there.

Q. You mean that standing on the west side of this bridge or at [fol. 295] the west end of the cut and looking in the direction of this bridge, in a direct opposition from which this picture was taken that you couldn't see over on the west side of the bridge further than twenty feet Mr. Jones.

A. I will tell you, when you stand at the edge of that cut and look at that bridge your track leaves at the bridge and turns to the right, you probably might see the sky above the bridge and probably a little sky between the bridge and the opening where the train goes, but you dan't get a direct view.

Q. That is the very point I am talking about, can't you see between the top of the bridge and bottom and see an object like a train approaching on the track in your general line of vision?

A. You couldn't see a train until it got right under the bridge practically from that cut.

Redirect examination:

Q. You have stated that Exhibit No. 2 was taken from the place marked for it to be taken from the top of the concrete bridge right over the track?

A. Yes, sir, on top of the concrete bridge right over the track.

Q. This Exhibit No. 1, you have stated the place marked for it to be taken was 716 east of the concrete bridge on which side of the track?

[fol. 296] A. On the right hand side of the track going out.

Q. Or north side?

A. Yes, sir, northside.

Q. On the extreme edge of the cross tie.

A. Yes, sir, of the cross tie.

Further this deponent saith not.

[fol. 297] H. F. TAYLOR, called for plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. This is Frank Taylor?

A. Yes sir.

Q. Do you work for me?

A. Yes sir.

Q. You went out with Judge Bryan, Mr. Jones and myself Saturday afternoon when these measurements were taken?

A. Yes sir.

Q. Now did you subsequently go back with a photographer when these photographs were taken?

A. Yes sir.

Q. Now the one made from the top of the bridge, Exhibit No. 2 where was the camera there when that picture was taken?

A. It was on the top of the bridge almost over the track.

Q. Over the track and on top of the bridge?

A. Yes sir.

Q. Looking over the railing of the bridge and pointing east?
A. Yes sir.
Q. You were present there when the picture was taken?
A. Yes sir.
Q. Now then, I hand you Exhibit No. 1, looking west, you re-
[fol. 298] member while we were out there we marked on the cross tie that place for the camera to be set which Mr. Jones has identified as 716 feet east of the bridge?
A. Yes sir.
Q. Was the camera placed there?
A. Yes sir, directly over it.

Further this deponent saith not.

[fol. 299] J. S. JOHNSON, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Bryan:

Q. In July, or July 9th, 1918, in whose service or employment were you?
A. I was in the employ of the Nashville Terminals.
Q. Are you still in the employ of that company?
A. Yes sir.
Q. What was your particular work on July 9th?
A. I was towerman at the N. & C. Shops on July 9th.
Q. What time of day did you go on duty on July 9th 1918?
A. Well, it was about five or six minutes after seven o'clock in the morning.
Q. When you went on duty did you relieve any one else who had been on duty in that tower?
A. Yes sir.
Q. Who was it?
A. Mr. A. A. Rymer.
Q. Mr. Johnson have you any signals in connection with that tower for the passing or stopping of trains?
A. *Yes, sir.*
[fol. 300] A. Yes sir.
Q. Are they worked by yourself or who ever is in charge as operator of the tower?
A. Yes sir.
Q. Did your signals, the signals you had and used there that day indicate whether the track is clear going and coming?
A. No, sir, it don't indicate that.
Q. How is that?
A. It does not indicate going and coming, it indicates the route that the signal governs.
Q. Was your signal clear or a stop signal that morning?

A. The signal was at proceed, that the route was right for the train to pass, for No. 4, if he had the right to go.

Q. The signal indicated that for No. 4 to proceed west toward Hollow Rock if he had the right to go?

A. Yes sir.

Q. Is that it?

A. Yes sir.

Q. Who gave that signal, you or your predecessor?

A. I did.

Q. You gave it?

A. Yes sir.

Q. You got no orders for a stop signal from any one?

A. No sir.

[fol. 301] Q. And at that time did you know that No. 1 was late?

A. No, sir, I did not.

Q. Had you received any order about No. 1 that was sue in Nashville about that time?

A. No, sir, I had not.

Q. You saw No. 4 as it passed, did you?

A. Yes, sir.

Q. And your signal on the tower at that time was to proceed?

A. In proceed position, yes, sir.

Q. How long have you been in the railroad service Mr. Johnson?

A. I believe I entered the service in 1892.

Q. That is about how long?

A. Twenty-seven or twenty-eight years.

Q. Twenty-eight years?

A. Yes, sir.

Q. Now does a passenger train carry a flagman?

A. Yes, sir.

Q. Where is his place, the flagman on a passenger train?

A. Well, the flagman is supposed to protect the rear of the train as I understand it.

Q. Now after No. 4 passed, did you report No. 4 as having passed to anybody or any where?

A. Yes, sir, I reported to the train dispatcher.

[fol. 302] Q. Did you get any reply?

A. Yes, sir.

Q. What was the reply?

A. He said he is supposed to meet No. 1 there.

Q. And what further?

A. "Can you stop him".

Q. You got word to stop No. 4?

A. Yes, sir.

Q. Did you make an effort to stop No. 4?

A. Yes, sir.

Q. What did you do?

A. I have an emergency whistle in the tower that works by air, it is an air whistle that we always used for emergency purposes and not used for any other purpose and I caught hold of that whistle and tried to stop him with the whistle.

Q. Was the flagman on the rear of that train that morning No. 4?
A. I didn't see him.
Q. If that flagman had been there would he have caught such signal?

Objected to as a conclusion and sustained.

Q. State how far—was the train in sight when you gave the signal to stop the train?
A. Yes, sir, it was in sight when I blew the whistle.
[fol. 303] Q. And was it within hearing distance from the rear of the train to the tower?
A. Yes, sir, I suppose so.
Q. Now I will ask you was the flagman on the rear of that last coach?
Q. I didn't see him.
Q. If he had been there would you have seen him?

Objected to as calling for a conclusion.

By the Court: State whether or not he could have seen him, and what his opportunities were to see him.
Mr. Bryan: I didn't catch the objection to that. He said the train had passed and he didn't see him and that the train was in sight, not my question was if he had been there could he have seen him.
Objection withdrawn.

A. Yes, sir, I could have seen him.
Q. And you didn't see him?
A. No, sir.
Q. What else, if anything, was done to stop that train by you or by [fol. 304] any one there just at that moment.
A. Well, there was some men down on the platform that I remember seeing them waive their hat across the track, a stop signal, that is all the kind of a flag they had. I don't remember who they were, I was trying to keep my eye on the train, and saw some parties out there by the track.
Q. Tell the Court and jury waiving your hat out that way, in railroad signal or parlance, what did that mean?
A. That meant stop.
Q. You railroad men had your signals for stopping?
A. Yes, sir.
Q. The man on the track, who was he that gave that signal by waiving his hat.
A. No, sir, I don't know who he was Mr. Bryan. There was always a crowd of men there every morning when these trains go out. I can't tell you who he was, I don't remember, but I do remember he did that.
Q. Mr. Johnson, I don't recall definitely whether I asked you if at the time you gave the signal to stop that train No. 4, if the man had been on the rear platform whether he was near enough to have heard that signal?

A. Yes sir, he was near enough.

Q. Mr. Johnson, you stated that you reported that No. 4 had passed on its way west, is it the duty of the man in the tower to report [fol. 304½] the passing of each train?

A. Yes, sir, to the train dispatcher.

Q. The man whom you relieved that morning was Mr. Rymer.

A. Yes, sir.

Q. He was the tower man and you relieved him?

A. Yes, sir.

Q. When you relieved him did he tell you that No. 1 hadn't passed?

A. No, sir.

Q. He did not?

A. No, sir.

Q. And you yourself didn't know whether it had passed or not?

A. No, sir.

Cross-examination.

By Mr. Walker:

Q. You are now and were on July 9th, 1918, the operator in the tower at the shops?

A. Yes, sir.

Q. And how far is the tower at the shops from the Union Station?

A. About two miles and a half I judge Mr. Walker.

Q. About two miles and half west?

A. It might be a little more that that.

[fol. 305] Q. What time did you go on duty that morning July 9th, 1918?

A. I was a little late that morning, I think six or seven minutes late, five or six any way.

Q. What time did No. 4 pass the tower at the shops.

A. She passed at 7:15 A. M.

Q. Now when No. 4 passed the shops at 7:15 A. M. you entered that up on your book, did you?

A. Yes, sir.

Q. Now then, after No. 4 had passed the tower and you had entered that fact on your books, you called up the operator, I mean the chief dispatcher here at Nashville notifying him of the fact that No. 4 had passed you, didn't you?

A. Yes, sir.

Q. How long did it take you to enter up the time, after looking at your watch and entering that fact on the book, and calling up the dispatcher at Nashville, what period of time did that take.

A. Well, that oughtn't to have taken more than a minute and a half. I think the train got by a full length.

Q. Wouldn't a train run further than a length and a half in a minute and a half.

A. It was not that long.

Q. I know a minute and a half is a pretty long time, and you are just estimating it.

[fol. 306] A. It came along by and I kept my eye on the train to see if it is a full train, then when he passes me I enter it on the sheet, and when the telephone is not busy I report it. If the train dispatcher is using the wire and giving another order I wait until he gets through, but in this case the train dispatcher wasn't busy and I gave it promptly and the train went by just as I reported him.

Q. When you told him that train No. 4 has passed the shops the chief train dispatcher said to you "passed" and you said "yes he has passed" and thereupon the chief train dispatcher said "stop him" didn't he?

A. Yes, sir, "can you stop him".

Q. "Can you stop him".

A. Yes, sir.

Q. And then immediately, all the time train No. 4 while you were having this conversation, was running on down the track in the direction of Hollow Rock, wasn't it.

A. Yes, sir.

Q. How fast was train No. 4 going when it passed the shops?

A. I don't know Mr. Walker, say twenty-five miles and hour, it might have been thirty.

Q. Thirty miles an hour?

A. Somewhere along there.

Q. How long was this train?

[fol. 307] A. Well, it was a regular train, I think those regular passenger trains carried six or seven coaches.

Q. How long is a coach?

A. I can't tell you that Mr. Walker, I don't know.

Q. They are about sixty or eighty feet long, aren't they?

A. Some of them are, yes, sir.

Q. These are regular passenger coaches then?

A. Yes, sir.

Q. They were eighty feet?

A. This was a regular train and they have a regular make up, whatever the equipment is that is what he had on this occasion.

Q. Those were eight- feet, weren't they?

A. I expect they were.

Q. So you think the train then was about a train or a train and a half length past the shops?

A. Yes, sir, I think it was.

Q. That was when you got knowledge that the chief train dispatcher wanted you to stop train No. 4?

A. Yes, sir.

Q. Well, the engine and tender, they are about together, about the same length as a coach?

A. Yes, sir, they have some engines out there that are ninety feet long, I don't think this engine was that long.

Q. This was engine 282, you know the type of that.

[fol. 308] A. I don't suppose that is the longest class, I suppose possibly eighty feet, seventy five or eighty feet long.

Q. You say there was six coaches and tender and engine that would make the equivalent to seven coaches in length?

A. Yes, sir, that must at least would be the length of the train.

Q. That would be about 560 feet, if it was a train length after it passed you when you got information that the chief train dispatcher wanted you to stop train No. 4?

A. Yes, sir, according to that estimation.

Q. The flagman stayed on the rear of the train as a general rule until it got to the shops, the station limit there?

A. Yes, sir, they are mostly always on the rear of the train.

Q. Of course you don't know what the flagman was doing?

A. No, no, I had not way of knowing that.

Q. You don't know where he was prior to the time that he got to the shops?

A. No, sir, I do not.

Q. And when the operator said to you to stop the train you ran over and sounded this emergency whistle?

[fol. 309] A. Yes sir.

Q. You did everything you could to stop the train?

A. Undoubtedly I did.

Q. Now then, after that you sent a switch engine out down the track after No. 4 trying to stop it didn't you?

A. We didn't get that far with that switch engine, we tried to get it out but we decided it was best not to undertake it.

Q. What else was done in the way of blowing whistles?

A. The switch engines did the same, they sounded their whistles, that was away up above me, that was a half a mile beyond me at the Tennessee Central overhead bridge where this engine was standing.

Q. No. 4 kept on going and was out of sight by that time of course?

A. Yes, sir.

Q. When you went on duty that morning you saw No. 4 as you looked down in the direction of Nashville coming on approaching the shops?

A. Yes, sir.

Q. And you gave the signal controlling the movement of No. 4 past the shops that morning or up to the shops?

A. Well I guess the blockman in the partition before me let No. 4 in the block then I gave the signal he should have to get through [fol. 310] the yards.

Q. Train No. 4 is controlled by a block system, as well as all over trains, between the shops and the Union Station are they not and were at that time?

A. Yes, sir, that is correct.

Q. And they still are?

A. Yes, sir, they still are.

Q. Now then after they get past the shops they are controlled by superiority of trains, and by time tables and train orders, they were at that time?

A. That is going north they are.

Q. Like train No. 4.

A. Yes, sir, No. 4 was, she was subject to the time table after she passed the shops.

Q. That was a north bound train and train No. 1 was a south bound train and therefore No. 1 was the superior train and had the right of way?

A. Yes, sir.

Q. Now as a general rule train No. 1 when on time and train No. 4 when on time passed each other some place between the shops and the Union Station?

A. Let's see, No. 1 was due at the shops on those dates at 6.55.

Q. What did you say?

A. 6.55 at the shops.

Q. No. 1 was due at 6.55 and No. 4 was due at 7.08 therefore when [fol. 311] they were both on time they would meet on the double tracks at Nashville, that is what I say?

A. Yes sir.

Q. You don't know whether No. 1 had arrived or not when you gave this signal?

A. No, sir, I didn't know it.

Q. And so far as you were concerned in the discharge of your duty, it didn't make any difference whether No. 1 had arrived or not?

A. Not a particle.

Q. You had no right to control the movements of a train by your signals so as to supersede a superiority of trains, or to stop a train or to supersede a train order or anything like that did you?

A. Certainly not.

Q. So when No. 4 pulled in that morning you lined up the switches for it?

A. Yes, sir.

Q. You gave a signal indicating that the signals were thrown for No. 4 to go on in the direction of Hollow Rock provided that he had a train order, or had the right to go?

A. Yes sir, that was it exactly.

Q. That was exactly it?

A. Yes, sir.

[fol. 312] Q. Unless train No. 4 had the right to proceed past the shops the signal that you gave him indicated that the switches were thrown for him meant absolutely nothing to him?

A. That is right, nothing at all.

Redirect examination:

Q. If you had been informed by the man you relieved by Rymer, or any one else, that No. 1 was late and hadn't come in, would you have given a signal to No. 4 to proceed?

Mr. Walker: We object to what he would have done or didn't do. He was acting according to the rules. There is no act of negligence alleged in the declaration on that.

Mr. Bryan: Here is a man in charge of this tower, in charge of these signals. He testified that he gave a signal to No. 4 to proceed, now upon cross-examination he has gone on to show that under the orders or rules he had no right to proceed unless he got it from the

dispatcher's office. Now I want to show the operation of these rules and I have asked this man who said he gave the signal to proceed if he had known No. 1 hadn't come in, if it was late would he have given that signal.

[fol. 313] Objection withdrawn.

A. The fact that he would say No. 1 was late would not have made any difference Mr. Bryan.

Q. If you had been informed by the man you relieved, by Rymer, or any one else, that No. 1 was late and hadn't come in, would you have given the signal to No. 4 to proceed?

A. If he had only said "late" I wouldn't have known how late that was. He would have to give me some time before I would take any action at all. If he just said "late" I wouldn't know whether they were going to meet at Dickson or Hollow Rock Junction, but if he said five minutes late or ten minutes late and No. 4's time was up and No. 4 had used all of that time, then I would possibly have asked if they were going to meet there.

Q. You have been asked if No. 4 with other trains were not operated under what is known as the block system and you said they were, and by the blocks it is meant the trains are blocked and can't be moved. I want to know who gives you the order to release a block or do you get the order?

A. I don't understand that question Mr. Bryan.

Q. Who releases the block?

A. I don't know anything about the block being released, we clear them.

Q. Explain that.

[fol. 314] Mr. Walker: Probably not being a railroad man, I am not either, they don't release a block, he has control of the block and of course there is a chief dispatcher at Nashville, as I understand and he has control of certain block signals there at the shops and he gets his orders of course from the chief dispatcher at Nashville.

Mr. Bryan: That is what I am asking the witness.

A. We simply give a train the block south of me, that is, between the shops and Nashville at Bostick Street. He got No. 4 and asked me is the block clear for No. 4, that is, if anything that has gone out ahead of No. 4 has not yet reached the shops, that is any kind of a train, and if the last train has been reported and entered on the sheet, we say, block is clear, let No. 4 come, that is a clear signal, that is the way we do that.

Q. You stated in answer to a question by Mr. Walker that a switch engine soon after No. 4 has passed got into action and that it blew its whistle which you heard about a half a mile away, was that correct?

A. I think it is a half a mile up there, I think that is correct.

Q. Was that switch engine also endeavoring to call the attention of No. 4?

[fol. 315] A. That is what I understood. I wasn't near him.

Q. How did that engineer or whoever it was in charge of the switch engine get the information?

A. He taken up the information from that air whistle I was blowing from the tower.

Q. Then he heard your whistle half a mile away?

A. Yes, sir.

Q. Then your whistle is a very loud one?

A. A very loud one and a very long sounding one.

Recross-examination:

Q. Now Mr. Johnson, as I understand the matter, train No. 4 on some occasions when you would give it the proceed signal, and before No. 1 had arrived, and before you knew it had arrived, would go on past the shops off of the double track on to the main and on past the point where they had the wreck, and go sometimes as far as Dickson before it met No. 1, but when they would do like that they always had a train order, didn't they?

A. As a matter of fact they might go on down the road any distance and meet No. 1 I wouldn't know anything like that about a train order, that is up to the train dispatcher whether you give him one or not, we don't have anything to do with that.

Q. The fact that train No. 1 whether it had or hadn't arrived had nothing to do with your control of the signal indicating that the track [fol. 316] was lined up if No. 4 had the right to proceed if he wanted to.

A. That was all. Those signals out there don't confer any rights on a train other than that the route they are supposed to go over is prepared for the train. That is all the right the signal gives. It don't supersede any other train or anything like that. It simply notifies the engineer that the track is lined up if he has got the right to proceed out on the single track to go on and if not to stop.

By the Court: Then if I understand you correctly when you gave the signal to proceed, under the rules, the engineer on this No. 4 then understood that he had the right to go out on the main track, is that correct?

A. It indicated——

Q. It didn't indicate to him that he wouldn't meet something?

A. No sir, it didn't confer any rights on him at all.

Q. He had no right to assume that the track to the next station was clear?

A. Oh no, no, no, not in the least. It never did confer anything like that.

[fol. 317] Mr. Walker:

Q. The fact that this signal was given, that didn't indicate to him or any person in charge of the train just arbitrarily that he had the right to leave the double track and go on to the main track, but it meant to him did it not, that the switches were lined up for him to go on to the main track if he had the right to do it.

A. Yes, sir, that is what it meant.
Q. That is to say, if he had an order to meet No. 1 at Dickson.
A. I wouldn't know anything about that.
Q. You wouldn't know anything about it but if he did have an order to meet No. 1 at Dickson that morning that signal meant for him that the tracks were lined up for the main and for him to go on and meet No. 1 at Dickson?
A. Yes, sir, that didn't give him any right, I have been out there too long——

Objected to and sustained.

Q. State whether or not on previous occasions No. 1 had not arrived and therefore hadn't passed No. 4 between the shops and the Union Station and you would give a proceed signal and yet the engineer had no train order and whether or not with the signal at proceed he would stop and wait for No. 1 to come in?
A. Yes sir.

Redirect examination:

Q. Was there an operator or agent of the road at Belleview on that [fol. 318] day?
A. Yes sir.
Q. Was it his duty to report the passing of No. 1 to Nashville?
A. Yes, sir.
Q. Would that report come over your wire?
A. Yes, sir.
Q. You would know it then?
A. We have a telephone out there. I wouldn't know it unless I had the telephone up to hear out there. We couldn't put all our time in on the telephone, we have other duties to do, we might not have heard it then at that though we could have heard it if we were supposed to.
Q. Then the man you relieved knew as a fact that No. 1 hadn't come in?
A. He told me——

Objected to what he knew.
Sustained.

By the Court: Introduce him to prove what he knew or didn't know. It would be hearsay on his part.
Mr. Norvell: This gentleman was stating what he told him and that would be in line of his duty.
[fol. 319] Mr. Walker: You would have to introduce him to show what he did. I don't know what language he used in talking to this man.
Mr. Bryan: Where is Mr. Rymer now?

A. He is engaged with the Terminal Company out in the Radnor yards.
Q. He is still with the company?
A. Yes, sir.

Mr. Walker: If you want him here we will get him.
Mr. Bryan: What are his initials?
A. A. A. Rymer.

Further this deponent saith not.

[fol. 320] W. G. JONES, recalled by the defendants for further cross-examination deposed as follows:

By Mr. Walker:

Q. Mr. Jones, I asked you awhile ago about standing at the west end of the cut, the rock cut shown in Exhibit No. 1, if you couldn't see on beyond and west of the bridge and how far west of the bridge you could see and you said you couldn't see over twenty feet?
A. I said I didn't know the exact distance. I never measured it. I said you couldn't see the track very far, you could see the opening and the sky between the bridge and above it.
Q. Didn't you say you couldn't see over twenty feet?
A. That would be the top of the track.
Q. Didn't you say twenty feet?
A. I said about, I should judge.
Q. I show you a picture here with an engine standing on the track?
A. Yes, sir.
Q. With the pilot right opposite the end of the bluff, and with the picture showing that evidently the picture was taken from the cab of the engine looking west in the direction of this bridge, now don't you see from this picture, which shows for itself, that you can see much further than you thought you could see?
[fol. 321] A. You can't see a great deal of distance. Your picture there shows you can't see very far.
Q. You can't?
A. No, sir.

Mr. Norvell: The picture speaks for itself—the party who took the picture can testify about it, and of course I except to Mr. Walker's statement of the exact position. I say the picture shows for itself.
By the Court: The picture shows for itself.

Mr. Walker:

Q. Of course if the camera was sitting where the point of the pilot of this engine is, right at the end of the cut, you could see that much further, couldn't you?
A. Certainly, that was taken from the cab.
Q. I want to make that exhibit No. 3 to your testimony.
A. Yes, sir.

Further this deponent saith not.

[fol. 322] STIPULATION AS TO BAPTISMAL CERTIFICATE.

Mr. Norvell: May it please the Court, by consent, I want to file a certified copy of the Baptismal Certificate of John George Kennedy, the boy named in the declaration. Given under the hand and seal of Rev. Jas. T. Gorigan, showing that John George Kennedy was baptised on October 28th 1900 by Rev. D. W. Ellard, and was born October 22, 1900. I file it as Exhibit No. 1 to this stipulation.

Furthermore, that the records of the City Health Office in the book collating the births in the City of Nashville from July 1st to November 30th 1900, shows that on October 22nd, 1900 there was born to David Kennedy and Mary Kennedy a white child, male, attending physician Dr. J. M. Coyle. Occupation of father, Railroad Engineer, Residence of parents 133 Morgan Street, Nashville, Tennessee.

[fol. 323] ANNIE MAY KENNEDY, recalled for the plaintiff, testified as follows:

Direct examination.

By Mr. Norvell:

Q. Miss Annie May, in examining you and your sister Thursday I omitted to ask a question, what is the health of yourself and John George and your sister Katie Bell?

A. Excellent.

Q. Now Miss Annie May, I believe I also asked *asked* you the other day the age of your father at the time of this accident?

A. Yes, sir.

Q. I believe you stated seventy two, why did you say that?

A. Because we had a birthday party the October before he was killed. He was killed in July. We had a birthday party October 22nd and he told us he was seventy two years old and we had seventy two candles on the cake, and he had several men there.

Q. Repeat the answer.

A. In October before he was killed he had a birthday party and had a cake with seventy two candles on the cake. He said he was seventy two years old on October 18th.

[fol. 324] Q. Then that was the information from your father and that was the specific occasion of his last birthday?

A. Yes, sir.

Q. And was Mr. Geary there among others?

A. Yes, sir.

Cross-examination.

By Mr. Walker:

Q. Your father then, Miss Kennedy, was killed on July 9th, 1918, so that he was according to the statement he gave to you on

that date, he was seventy two years of age 8 months and 21 days, in other words, if he had lived from July 9th, 1918 to October 18th, 1918, he would have been seventy three?

A. Yes, sir.

Q. So he was nearer seventy three?

A. Yes, but he was not seventy three, he was still seventy two.

Q. He was still within the 12 months, I understand that, according to that?

A. Yes, sir.

Q. Now what was the date of your birth?

A. August 10th.

Q. What year?

A. I don't know, I can count back and tell you how old I was.

Q. How old are you now?

[fol. 325] A. I am twenty six, was 26 on the 10th day of last August.

Q. So you were past twenty one on the day your father was killed?

A. Yes sir.

Q. How old is your other sister?

A. She will be 24 next November.

Q. So she was past twenty one at the time your father was killed?

A. Yes sir.

Q. Did you or your sister tewtify that Mr. Kennedy kept back fifty dollars a month?

A. Something around that.

Q. He kept back that much?

A. Yes, sir.

Q. Out of that he paid his insurance and the amount due the Brotherhood of Locomotive Engineers and other incidental expenses and spending money and matters like that?

A. Yes, sir.

Q. Now there was you and your sister and Mrs. Kennedy and your father that were living together at that time?

A. Yes, sir.

Q. Of course this money that was turned over to your mother by your father, Mr. Kennedy, was used in paying the grocery bills and rent of the house and other expenses of life, incident to the family life?

A. Yes, sir.

[fol. 326] Q. And of course his livelihood, or what he ate, and the matters like that, they were paid for out of this money that he turned over to your mother.

A. Yes sir.

Further this deponent saith not.

[fol. 327] P. J. GEARY, recalled by the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. I believe you testified on the stand the other day in substance that Mr. Kennedy would be about 74 now, and was about 72 at the time of the accident?

A. Yes sir.

Q. Do you remember any specific occasion as to his birthday last preceding his death?

A. Yes, sir, I was present at that birthday party.

Q. With some friends of which you were one?

A. There was five others besides Mr. Kennedy.

Q. Did they have a cake and candles?

A. Seventy two candles, we all remarked, and laughed at him that night, called him a little baby, joked with him.

Q. The cake was filled with candles?

A. Yes, sir, short ones.

Q. And that was the information given by him and members of his family, that was the number of candles.

A. Yes, sir.

Cross-examination.

By Mr. Walker:

[fol. 328] Are you familiar with the handwriting of Mr. Kennedy?

A. I think I would be, I have seen a lot of it, I think I would be familiar with it.

Q. Now Mr. Geary, I show you a paper here with the words "Department of the Interior" with letters "L O. No. 1,368,238 Department of the Interior, David Kennedy 338 Ohio Infantry, Bureau of Pensions Washington, D. C. December 7, 1907, Dear Sir. To aid this Bureau to prevent any one from falsely representing you or otherwise committing fraud in your name on account of your service, you are required to answer fully the questions enumerated below. You will please return this circular under cover of the enclosed envelop- which requires no postage, Signed V. Wagner, Commissioner, Addressed to David Kennedy, Nashville, Tenn. and with several questions propounded in printed form, and with answers given thereto in writing, written with pen and will ask you to state as a matter of fact if the signature of David Kennedy, together with the answers, written in pen, are not written in the hand writing of Mr Kennedy.

A. It resembles very much his handwriting.

Q. Your judgment is that that is his handwriting?

A. Yes, sir. I think that is his handwriting. Mr. Kennedy never

signed the same all the time, sometimes it varied from others you know.

Q. And did you know a man named John G. Kean?

[fol. 329] A. Yes sir, I knew him personally.

Q. And John Harrington?

A. I think I know Mr. Harrington, but Mr. Kean is dead. He used to look after those pensions. I knew him mighty well.

Q. I want to read this into the record.

L. Where were you born, Marion County, Alabama No, When were you born, Marion County, Alabama.

2. Where were you born? And he answered the wrong one, October 17th, 1844.

3. When did you enlist, Tuscumbia Alabama.

Q. Where did you enlist? July 19th, 1862.

(He has just got the answers backwards but I am reading it just like it is.)

Q. Where did you live before you enlisted, Pikeville Marion County, Alabama.

Q. What was your postoffice address at enlistment, Pikeville, Alabama.

7. What was your occupation at enlistment? Farmer.

8. When was you discharged? May, 1865.

(Where were you discharged? Close of war.

10. Where have you lived since discharge, give dates as nearly as possible or any change of residence, Nashville, Tennessee, from my discharge until present.

11. What is your occupation, Railroad man.

12. What is your height, five feet ten inches.

Your weight, (no answer) The color of your eyes, Blue, The color [fol. 330] of your hair, Brown, Your complexion, light, are there any marks or scars on your person, if so describe them. None.

13. What is your full name, Please write it on the line below in ink in the manner in which you are accustomed to sign it in the presence of two witnesses who can write (Signed on the line below also.)

David Kennedy. Witnesses: First, J. G. Kean; 2nd, John Harrington.

Words written under there, Witnesses who can sign here" Date, December, 13th, 1907, Those answers I believe you say were written in the handwriting——

A. This signature looks very much like Mr. Kennedy's signature.

Q. The other is the same, isn't it, written in the same ink, and the same handwriting except the names of the witnesses.

A. This is not the same Mr. Walker, that right here isn't his writing this is the same name but this is a different writing from the other writing.

Q. At any rate, this is his signature.

A. That is his signature.

Q. Signed in response to the answers given to the question.

A. Yes, sir.

Q. I show you another paper purporting to be an affidavit which I will read to you in a moment with the signature David Kennedy, [fol. 331] appearing thereon, written above the words "Claimant's signature in full" and will ask you to state if that is not his signature.

A. Yes, sir, it is.

Q. I want to read that in to the record.

"STATE OF TENNESSEE,
County of Davidson:

On this 28th day of May, A. D. 1912, personally appeared before me — Notary Public within and for the County, and State aforesaid, David J. Kennedy, who being sworn according to law declares that he is 67 years of age and a resident of Nashville, County of Davidson, State of Tennessee, and that he is the identical person who was enrolled at Tuscumbia, Alabama under the name of David Kennedy, on the 19th day of July, 1862, as a private in Company B, 38th. Regiment Ohio Volunteer Infantry, (Here state rank), company and regiment in the Army or vessels if in the Navy) In the service of the United States, in the Civil War and was honorably discharged at Columbus, Ohio on the 18th day of May, 1865, that he also served no other service, that he was not employed in the military or naval services of the United States otherwise than as stated above, that his personal description at enlistment was as follows: Height five feet nine inches, complexion, light, color of eyes, blue, color of hair, brown, that his occupation was farmer, that he was born in Marion County, Alabama, October, 17th, 1844, that his [fol. 332] several places of residence since leaving the service have been as follows: Nashville, Tennessee, that he is a pensioner under certificate No. 1141588 that he has applied for pension under original number, 1141588, that he makes this declaration for the purpose of being placed on the pension roll of the United States, under the provisions of the Act of May, 11th, 1921, that his post office, address is Nashville, County of Davidson, State of Tennessee.

(Signed) David J. Kennedy. Attest, Charley Robertson. John E. Freel, Jr.

Subscribed and sworn to before me, this 28th day of May, A. D. 1912,

and I hereby certify that the contents of the above declaration, etc., were fully, made known and explained to applicant before swearin- including the words — erased, and the words — added, and that I have no interest direct or indirect in the prosecution of this claim. (Signed) John G. Kean, Notary Public, with his seal.

A. I knew him personally, Mr. Kean, he died here about a year or two ago.

Q. Now the, If Mr. Kennedy, was born on October, 17th, 1844, as he swore in this applicaton, on July, 9th. 1918, he was 73 years, in fact he liked three months and nineteen days of being seventy four years of age, didn't he.

Mr. Norvell: *If you were at his birthday party, he had* If that [fol. 333] first fact is true, of course the second one is true.

Witness: If you were at his birthday party, he had 72 candles there.

Mr. Walker:

Q. That is his signature in which he swore under his oath to the United States Government.

A. Yes sir.

Q. Mr. Geary, in addition to the statement heretofore read to you, which you say was in the handwriting of Mr. Kennedy, and in addition to the affidavit read to you, which you say was signed by Mr. Kennedy before Mr. Kean a Notary Public, I want to show you this paper with the signature of Mr. Kennedy appearing thereon immediately the words, "Claimants signature in full," and ask you to state if that is in Mr. Kennedy's handwriting.

A. Yes sir, that is his handwriting.

Q. Now I will read you the affidavit.

"Act of February 6th, 1907

DECLARATION FOR PENSIONS

The pension certificate should not be forwarded with the application.

STATE OF TENNESSEE,
County of Davidson:

On the 2nd day of November, A. D. 1907, personally appeared before me a Notary Public within and for the County and State aforesaid, David Kennedy, who being duly sworn according to law declares that he is 62 years of age, and a resident of the City of [fol. 334] Nashville (with figures out there that have been blurred or erased 1845) County of Davidson, State of Tennessee, and that he is the identical person who was enrolled at Tuscumbia, Alabama, under the name of David Kennedy, on the 19th day of July, 1862, as a private in Company B, 38th Regiment Ohio Infantry in the service of the United States in the Civil War, and was honorably discharged at Washington, D. C. on the 18th day of May, 1865, that he also served no other service, that he was not employed in the military or naval service of the United States otherwise than as stated above, and that his personal description at enlistment was as follows: Height five feet ten inches, Complexion light, color of eyes,

blue, color of hair dark, that his occupation was farmer, that he was born, October 17th, 1844, (with the last 4 apparently having at some time been erased) that his post office address at enlistment was Pikeville, Marion County, Alabama, that his several places of residence since leaving the service have been as follows: Nashville, Tennessee, since my discharge, that he is not a pensioner, that he has not heretofore applied for a pension, that he makes this declaration for the purpose of being placed on the pension roll of the United States under the provisions of the Act of February 6th, 1907, that his post office address is 133 Thirteenth Avenue, North, Nashville, [fol. 335] Tennessee, County of Davidson, State of *State of* Tennessee.

(Signed) David Kennedy. Attest: Susie Dougherty. Ella Carroll.

Also personally appeared Susie Dougherty residing in Nashville and Ella Carroll, residing in Nashville, Tennessee, persons whom I certify to be respectable and entitled to credit, and who being by me duly sworn say that they were present and saw David Kennedy, the claimant, sign his name, (or make his mark) to the foregoing declaration, that they have every reason to believe from the appearance of the claimiant and their acquaintance with him of two years and twenty-five years respectively, that he is the identical person he represents himself to be, and that they have no interest in the prosecution of this claim.

Susie Dougherty. Ella Carroll.

Subscribed and sworn to before me, this 2nd day of November, A. D. 1907, and I certify that the contents of the above declaration, etc. were fully made known and explained to the applicant and witnesses before swearing including the words — erased, and the City of Nashville Added, and that I have no interest direct or indirect in the prosecution of this claim. John G. Kean, Notary Public."

[fol. 336] A. I know all of those people.

Q. That you say is hos signature in which he swears *the* he on the 2nd day of November, 1907, was 62 years of age, and in which he swears he was born October 17th, 1844.

A. Yes sir.

Q. Now, Mr. Geary, I show you another paper which say-, declaration for widows' pension, purporting to have been signed by Mrs. Mary Catherine Kennedy, with the name, P. J. Geary, written on it.

A. Yes sir.

Q. I will ask you to state whether or not that is your signature.

A. Yes sir, that is mine.

Q. You were a witness and saw Mrs. Kennedy sign her name to this paper.

A. Yes sir.

Q. I want to read you the paper read it into the record but first,

before I read you this, did you testify about the age of Mrs. Kennedy the other day.

A. Yes sir, I did, I had been knowing Mrs. Kennedy in the neighborhood of thirty years.

A.—act of April, 1908.

STATE OF TENNESSEE,
County of Davidson:

On this the sixth day of August, 1918, personally appeared before me a Notary Public within and for the County and State aforesaid, Mary Catherine Kennedy, who being duly sworn by me according to law, declares, that she is fifty-seven — of age, July first, 1918, and [fol. 337] that she was born in 1861, at Nashville, Tennessee, Davidson County, that she is the widow of David Kennedy who enlisted July 19th, 1862, at Tuscumbia, Alabama, in the name of David Kennedy as a private in Company B 38 regiment, Ohio Infantry and was honorably discharged at Washington, having served ninety days or more during the Civil War that he alsom served —; that otherwise than herein stated said soldier was not employed in the United States service, that she was married to said soldier July 2nd, 1888, under the name of Mary C. Doughtery at Nashville, Tenn., by Rev. Father Delaney, that she had never been previously married, the said, David Kennedy, and Sally B. Callihan, (evidently his former wife) were united in marriage, July 9th, 1875, at or in St. Mary's Church, Nashville, Tennessee, the ceremony having been performed by Father Scandall, his said wife, having died, December 28th, 1882, there never having been *in* divorce proceedings between them, and that neither she *now* said soldier was ever married otherwise than as stated, above, and said soldier died, July 9th, 1918, near Nashville, Davidson County, Tennessee, that she was never divorced from him, and that she has never remarried since his death, that the following are the only childred of the Soldier who are now living and under 16 years of age, (if he left any children under 16 years of age the claimant should so state) Mary Kennedy Jones, born June 13th, 1883, at Nashville, Tennessee, Annie M. Kennedy, [fol. 338] born, August 10th, 1892, Katie Bell Kennedy, born November 9th, 1894, (I omitted something, after June 13th, 1883, for Mary Kennedy Jones, I should have said, Nashville, Tennessee, and after Annie May Kennedy born August 10th, 1892, at Nashville, Tennessee, and Katie Bell Kennedy, born November 7th, 1894, at Nashville, Tennessee) John George Kennedy, born October 22nd, 1901.

A. That is wrong, that should be 1900 because I have a daughter born the same year and the same month.

Q. I am reading the way this paper shows.

A. There is a mistake there.

Q. At Nashville, Tennessee, in France.

Q. He was in France at the time of the death of his Father.

that the above named children of the Soldier are not now receiving a pension, and that such children, are a member of her family, and cared for by her, Annie May Kennedy, and Katie Bell Kennedy are living with their Mother and are supported by their same Mother. That she has never heretofore applied for a pension, the number of her former claim being none, that said Soldier was a pensioner, the number of his pension certificate being 1,141,588 that she makes this declaration for the purpose of being placed on the pension roll etc."

(Signed) Mary C. Kennedy. Witness: Mary M. Ryan, 889
[fol. 339] McGavock building, Nashville, Tennessee; P. J. Geary, 215 Fifth Avenue North, Nashville, Tennessee; Mrs. Kennedy's address, number 6 Aberdeen apartment, 19th avenue and Hays street, Nashville, Tennessee.

Subscribed and sworn to before me, this 6th day of August, 1918, and I hereby certify that the contents of the above declaration were fully made known and explained to the applicant before swearing, including the words — erased, and the word — added and that I have no interest direct or indirect in the prosecution of this claim.

(Signed) C. C. Mooney, Notary Public.

A. Yes sir.

Q. Then according to that Mrs. Kennedy was 57 years of age, on July first, 1918, and she would not be 59 years of age, and three months.

A. Close to sixty years, she would be over fifty-nine; she is getting a widow's pension now. When this pension check came for Mr. Kennedy she had to send it back and make a widow's application for a pension which is twenty-five dollars a month.

Redirect examination.

By Mr. Norvell:

Q. Now Mr. Geary, the next to the last paper Mr. Norvell showed you, which was the last paper purporting to bear the signature of Mr. Kennedy, I hand it to you.

[fol. 340] A. Yes sir.

Q. I will ask you to look at the fourth line.

A. Yes sir.

Q. Giving the place of residence.

A. Yes sir.

Q. I will ask you to glance at that and of course we will pass it to the jury, I will ask you whether or not there is not some writing under the words, City of Nashville.

A. Yes sir.

Q. And after the words City of Nashville appears the figures "1845" which have been partially rubbed.

A. Yes sir.

Q. Mr. Walker, asked you here in regard to a statement on the paper that he was born October 17th, 1844.

A. Yes sir.

Q. I believe he asked you didn't it appear that the last four had been rubbed, examine it carefully and see that it doesn't appear that the figures under the 4 had been rubbed and 4 substituted like the "City of Nashville" above.

A. Yes sir, it looks that way.

Q. Can you see well enough to identify the figures on it.

A. It looks like a 5 underneath.

Q. There is a tail there that comes out of the bottom of the 4.

A. Yes sir, it looks like it would be a 5.

Q. Who is this Mr. Kean?

[fol. 341] A. He is a gentlemen that use- to be here years ago. He is an old man. He died a couple years ago with a cancer, but he use- to look after those pension papers for those people.

Q. He was a sort of a man that looked after those pension papers.

A. Yes sir, he looked after those pension papers.

Recross-examination:

A. Mr. Norvell, asked you if on the fourth line of the next to the last paper about which I asked you, which was an affidavit signed by David Kennedy, and also sworn to by Susie Doughtery and Ella Carroll if on the fourth line of that paper it didn't appear that an erasure had been made and that above the erasure the words City of Nashville had not been added and if at the end of the words City of Nashville if the figures 1845 did not appear which had apparently been erased, that is correct is it?

A. Yes sir, that is correct.

Q. And also the words that he was born, October 17th, 1844 and you stated that the last four appeared to have been erased and their is something there, that is correct is it?

A. That is correct, yes sir, it look like somebody tried to make a 4 and whoever wrote it discovered the mistake and tried to change it with a pen.

Q. In this same paper which appears the statement that he was born, October 17, 1844, where on the 4's has apparently been erased, there also appears in the affidavit that the affiant, who being duly [fol. 342] sworn according to law, declares that he is 62 is there.

A. No sir.

Mr. Norvell: I agree with that.

Mr. Walker:

Q. An affidavit was made on the 2nd day of November, 1907.

A. Yes sir.

Q. Now then, in this paper that I read to you dated, December, 7, 1907, and signed by Davids Kennedy, and witnessed by J. G.

Kean, the answer showing when he was born, to wit, October 17th, 1844, there is nothing rubbed out about that is there?

A. Not a thing that is perfectly clear.

Mr. Norvell: I agree on the preceeding two, there is nothing rubbed about the age.

The Witness: Somebody in making out the paper instead of erasing it wrote over it.

Mr. Walker: There is no change in any of the other four places except in the one instance.

A. That is right.

Further this deponent saith not.

[fol. 343] T. FLETCHER DENNIS, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr Norvell:

Q. This is Mr. Dennis, I believe you stated.

A. Yes sir.

Q. You are from the pension department at Washington?

A. Yes sir.

Q. And at the request of the attorneys for the defendants or the defendants you brought to this trial these papers that have just been read into the record?

A. Yes sir.

Q. Mr. Dennis, What is your position in the pension department.

A. I am Chief of the law division.

Q. You are pretty familiar with the matters pertaining then to pensions, aren't you? You have had experience for several years?

A. I have been there 36 years.

Q. Now, Mr. Dennis, I will ask you whether or not at the commencement of the civil war, just as at the commencement of the recent world war, I believe it is called, if the technical legal age for enlistment for soldiers was not 18 years?

A. Yes sir, that is my understanding that it was.

[fol. 344] Q. I will ask you also Mr. Dennis whether or not it is not a fact that your records and investigations show in your department that the enlistment age, dates of births to correspond thereto are not many times given or were not many times given in the civil war at 18 years of age, when as a matter of fact, the soldier was possibly seventeen or sixteen, or in other words, below the technical age?

Objected to other cases as immaterial. These affidavits that were signed by Mr. Kennedy were introduced for the purpose of showing that by his own statement he knew his age better than anybody, that at the time of this accident he was near 74 instead of 72 of age

as contended by the plaintiff. Now what other men did when they were making applications for pension, swearing, they say, that they were two years older than in truth and in fact they were, that is immaterial about them, it was what Mr. Kennedy did we are not trying this case to test Mr. Kennedy's credibility. I don't want it understood that I am trying to reflect on him in any way. It is just for the purpose of showing that he knew his age and what his age was and what anybody else has done is immaterial.

[fol. 345] Mr. Norvell:

Q. I will reform my question then. I will ask you if from your records and your investigation you first stated the legal enlistment age was 18, if it does not show, the enlistment papers do not show almost uniformly, I will put it uniformly, at the enlistment of the civil war, the age of 18 or over when the boys were in fact younger than that, Seventeen or sixteen?

Objected to as incompetent.
Overruled and defendants excepted.

Mr. Walker: I want to accept on another ground so as to get in the record the defendant excepts to the question on the ground that it undertakes by oral evidence to vary or explain the terms of a written instrument.

Overruled and defendant excepted.

A. Not uniformly by any means. I have seen every age recorded in the war department, I think from 10 years up to be actually of record, but it is true that 18 being the enlistment age it was frequently entered when our subsequent investigation showed the party was younger.

The answer based on hearsay objected to and sustained.

[fol. 346] Q. Now Mr. Dennis I will ask you whether this was true, or whether or not this was true that the investigations of yourself and your department don't show that there was a custom, say, for instance, in the enlistment of some troops, or the enlistment of a certain locality that there would be the age of 18 with nothing below that when your investigation showed that frequently members of that company enlisted at that place were below that age?

A. I have never seen those enlistment records as lists, but only in individual instances. The most I can say of that, and I have heard soldiers explain very frequently and have known soldiers to explain that apparent inaccuracy.

Question and answer objected to and sustained.

Q. Now Mr. Dennis, in examining into pension cases to determine whether pensions are due, whether the formalities had been complied with, who would have those enlistment rolls and would they be submitted to somebody in your department?

A. No, we call upon the War Department for an individual report in each individual case as to date, named date, and if they have a personal description of the soldier.

Q. Do the investigations from your department ever go far enough [fol. 347] to establish whether or not the matter I have just asked you about was true, namely the existence of a custom in the enlistment of certain troops, or enlistment in certain localities that the legal maximum age was stated, namely 18 when the parties, or many of them in that troop were enlisted at that point below that age?

A. It has gone far enough that it is a general understanding in the Bureau that the ages of eighteen and twenty one are regarded to be rather investigated, that it is not taken for granted that the eighteen was correct or the twenty one. Those seem to be the favorite ages.

Q. Now Mr. Dennis, you are familiar with the statutes, that is, you can identify them if shown to you?

Objected to an incompetent because the Court will take judicial notice of what the law is and you don't prove what the law is.

By the Court: What do you want to ask him.

Mr. Norvell: I want to ask him this question, showing him, to refresh his recollection U. S. compiled Statutes 1918 Edition, rather known as the compilation by the West Publishing Company.

A. I know the West.

[fol. 348] A. I -how you that for the purpose of refreshing your recollection is asking you the question, and will ask you if the Act of March 4th, 1907, Chapter 2920 Statutes at large, 1804 or section 8949 of the compiled statutes do not state that hereafter the age of 62 years or over will be considered a permanent disability within the meaning of the pension law?

A. That Act has a great history, it does not bear on the present question, that particular Act.

Q. All right, this is the Act though, there is an Act to that effect?

A. Yes, but it has a bearing on the Act of February 6th, 1907 under which this man was pensioned.

Q. Here is what I am getting at.

Mr. Walker: We agree that that is the Act.

Mr. Norvell:

Q. I am not familiar with the pension Acts, you straighten us out, all we want to know is the fact that if a man at this age could have gotten a pension, as a matter of fact if he is not this age he would have to say back there in 1907 that he attained a certain age before he would be entitled to a pension?

A. The Act of February 6th, 1907 was the first Act that gave pension for age. That March 4th Act was a supplement to it and had no special hearing.

Q. What age was named in the Act of February 6th, 1907?

[fol. 349] A. The minimum pension was given for 62.

Q. The same as was in the amen-atory Act of March 4th?

A. Yes, sir.

Q. What I am getting at is this, if Mr. Kennedy, and I believe Mr. Dennis the papers produced shows that Mr. Kennedy's application was in December 1907 for a pension, I have it December 13th, the memora-dum I have got of it.

A. The first application was ex-cuted November 2nd 1907.

Q. The other was December?

A. Yes, sir.

Q. Well, either date, November 2nd 1907, take that one, I believe that is the earliest date of either one of the three, I know it is.

Q. Yes, this was the first declaration he filed.

Q. Mr. Dennis, if Mr. Kennedy had been born on October 17th, 1845 and had served in the army, he would have been entitled to a pension on November 2nd, 1907 whether he had been disabled or not, just as much so as if he had been born October 17th, 1844, isn't that right?

A. Yes. If he was born October 17th, 1845 obviously he would have been 62 years old on November 2nd, 1907.

Q. In other words, what I am getting at is, whether his real date of birth was October 17th, 1844 as your papers tend to show that he [fol. 350] signed, or whether as a matter of fact his real date of birth was October 17th, 1845 there was no fraud perpetrated on the Government in the sense that any money was taken from the Government in the sense that he was born October 17th, 1845.

A. There would have been none granted.

Q. When was that?

A. The same law granted a higher rate when he attained the age of 65, a higher rate at 70, so the exact age was material.

Q. The next date of application was 1912, I have forgotten the date, you have it before you?

A. The exact date, May 28th, 1912, under the Act of May 11th, 1912 which increased the rate there, well a mi*m*imum of 12 and maximum of 30, the law is essentially the same except a little variation as to rates and ages.

Q. Was that the Acts of 1912?

A. Yes, sir.

Q. What was the difference between the mi*m*imum age and the next age at which a higher rate was paid, it was more than a year's difference?

A. Oh yes. I have never attempted to carry all those rates in my mind all the time, because I have always had a schedule before me.

Q. You know the Acts of gradation are three years apart?

[fol. 351] A. 62, 65 and 70. I think are the ages.

Q. 62, 65 and 70?

A. I think that is it. I wouldn't be certain about that. They have been enlarged a half dozen times nearly since and I am not clear on it.

Q. The only reason I asked you that question was, Mr. Dennis you said on application this rate would be increased, what I am getting at is, in 1912 the age given on that date would show that he was then 66

the age if he were born in 1845 would be 65, he would be entitled to the same pension whether he was 65 or 66 would he?

A. There is no need of my guessing at that the Act is printed before me. The act of February 6, 1906 has recognized the ages, if a person has reached the age of 62 $12.00 per month, 70 years of age $15.00 per month, 75 years of age -20.00 per month. I have the Act of May 1912 the same way, at 62 years of age $13.00 per month, in case a person has reached the age of 62 and served 90 days $13.00, 6 months—it varies in length—6 months $13.50 one year $14.00 per month, one and a half years $14.50, three years or over $16.00 per months. Then they take up the next beneficial age, in case a person has reached 66 and served 90 days $15.00 per month.

Q. If your papers show this man served from July 1862 to sometime in 1865——

[fol. 352] A. He is credited with 2 years and 10 months and 22 days.

Q. What would be 2 years and six months?

A. Yes sir.

Q. Give me what a man would receive that served two years and six months.

A. Under the first mentioned act under which he applied there was no distinction I believe as to length of service, but the man we are reading of, May 1912 he was granted a pension under that law, he had $24.00 per month from the birthday on which he became 70, we accepted his allegation of 1844 as correct and we gave him $24.00 from October 17th, 1844, the date he became 70.

Q. He had been increased since which date and year?

A. No that is the rate on the variation of length of service.

Q. What was he given at 69, what did they jump from?

A. 62, 66, 70 and 75.

Q. Now Mr. Dennis, was there any Act or rule of the Government that when the age was given at enlistment to make that conclusive so as to be amenable to service?

A. No, sir, pos-tively not, we found that couldn't be done.

Q. I understand you to say to me off of the stand something about the age given sometimes was conclusive. What was that statement, [fol. 353] during the lunch hour I understood you to say about some age being given at sometime- being conclusive, I possibly misunderstood you, did you make a statement——

A. No, sir, you utterly misunderstood me, I had no such thought. I could elaborate as to how we do it if it was necessary. We very very frequently require if there is a doubt in the case, we require them to prove by family bibles, and to prove exactly why they had made varying statements.

Q. You do know from your investigation that back in the forties public birth records were very seldom kept?

A. Not many states kept them at all like they do now.

Q. And particularly in our Southern States.

A. I presume that is true, but you would be surprised as to how some of our supposedly very enlightened States neglected that very important duty.

Cross-examination.

By Mr. Walker:

Q. You spoke about the Act of May, was that the act of 1907?
A. May 11th, 1912. The act of February 6th, 1907 was superseded by the act of 1912.
[fol. 354] Q. This application of Mr. Kennedy made in November of 1907 was based upon the supposition that he was 62 years old or older and was under the act of 1907.
A. That is true.

By Mr. Norvell:

Q. Mr. Dennis, I omitted to ask you one question, you answered me a few minutes ago that you gentlemen in your department didn't have before you the records of enlistments but in certain incidents you would call for them to be furnished you by the War Department, do you know or does your file show whether there was any such call in the case that you now have in your hands. Mr. Kennedy?
Mr. Walker: That would be written hearsay.

Overruled. Defendant excepted.

A. We have a report from the war department December 10th, 1907, in which he says, David Kennedy, Company B 38 Ohio infantry, the records show the following: age 17, height 5 feet 8 inches, complexion light, eyes gray, hair brown, place of birth, Marion County, Alabama.

Objected to as written hearsay. Overruled and defendant excepted.

Q. Give the date of enlistment?
A. Same record, enrolled July 19th, 1862.
Q. I will ask you whether or not those enlistment records were [fol. 355] not made up either by the party himself at the time placing his age herein, or by the officer, he giving his age to the officer and the officer making the record?
A. Of course I don't speak with an expert evidence on that, but that has been my understanding the officer required him to state his age.

Objeteed to as hearsay and sustained.

Q. Mr. Dennis what are those records the war Department has, they are enlistment records aren't they.
A. The original *a*listments of the company.
Q. And don't you as an officer of the Government know, just as well as you know that this is October 1920, without having been present when the Christian era started——

Objected to arguing.

Q. I will cut that part of it out, don't you as an officer of the Government know that the enlistments giving ages and other data were made up at the time of the enlistment by the officer of the company, either with or without the actual description by the applicant but based upon the applicant's statement, isn't that the official record of the department and don't you know it is made up that way?

[fol. 356] Mr. Walker: I object to that as calling for an opinion and leading, and third, no matter whether he knew that or not it is immaterial because it can't be considered as evidence, not having any probative value for the reason that it denies the defendant the right to cross examine whether the statements were true or untrue given by either the officer or the person making the enlistment.

Overruled and defendant excepted.

A. I have understood that they were made up rather carelessly in a way. I will state I heard it from soldiers themselves. I think maybe I ought to say that the pension bureau did not adjudicate this claim on the war deprtment record of eighteen, because, as I brought out a moment ago, the war department record would have made him nineteen the coming October or the previous October.

Q. You didn't catch the date.

A. Wasn't that what you brought out a moment ago? No, I didn't catch it. Or was it his statement?

Q. I asked you what the enlistment record of the war department was, it shows the age 17?

A. It shows the age 18 at enlistment in July, if he had lived [fol. 357] until October according to that he would have been 19, it would have made him born in 1843, we didn't so accept that war department record figuring down to 1843. We adjudicated this claim on his own statement, consistent statement. He gives the exact date of enlistment.

Q. July 19, 1862 give- you- age 18?

A. Yes.

Q. Does he give the date of birth or simply 18?

A. Just the number 18.

Objected; withdrawn.

A. It has come to me what you mean awhile ago about conclusive. I did state to you that there was an act passed February 1862, if I remember, holding men to the age they gave. If a boy under 18 stated he was 18 and afterwards sought to get out of the service on account of minority he was not permitted to do that, but it had no effect on the pension. I knew you must have had some reason for saying it but I couldn't think for the moment what it was.

Q. I thank you for the information.

Cross-examination continued:

Q. This application that Mr. Kennedy first made in November of 1907 was predicated and based upon the act of February 6th, 1907, as I understand you?

A. That is right.

Q. And upon the representations that he made with reference to his [fol. 358] age the pension was issued to him in accordance with the act of February 6, 1907 and based upon the time that he had been in the service, was it not?

A. There was no differentiation at that time for length of service, he must have served nine*th* days or more.

Q. But irrespective of the time of service in the army, the pension was issued to him based upon the statements that he made to the Department of the Interior and predicated upon the act of February 6, 1907?

A. Yes, sir.

Q. So how much did he draw then from the representations that he made to the department under this first application?

A. He was allowed $12.00 per month commencing November 6th, 1907 the date of his application.

Q. How long did that twelve dollars a month continue?

A. He continued to draw that until he established a claim under the act of May 11, 1912 which gave widely differen*tly* benefits depending not only on the age but length of service.

Q. How much did he draw on that.

A. They allowed him $24.00 a month commencing October 17th, 1914, based on a service of more than two years and a half which was the benefit.

[fol. 359] Q. And age 70?

A. That was his birthday.

Q. How much a month did he draw on that?

A. $24.00 a month.

Q. Now the fact that that application filed by him showing him to be somewhat older maybe, in fact as has been shown here, that he claimed himself to be was a material matter with reference to the amount that he received?

A. In the first allowance it wasn't immediately material but it had a bearing on the future time when he should attain the age of 65?

Q. In other words, if he was two years younger in fact, and represented himself to be in fact two years older, he just got the advantage of that two years towards attaining the age of 65?

Mr. Norvell: We are only contending one year's difference. We showed that he was born on October 17th, 1845 and you contend it was 1844.

Mr. Walker:

Q. That is a fact. It was material in that respect.

A. Yes, sir.

Q. He was drawing thirty dollars a month I believe at the time of his death.

[fol. 360] A. No, He would have gotten thirty under that act when he became the age of seventy-five, but he didn't live until that age. That was however passed June 10th, 1918, and I understand he died in July a month later lacking a day after the passage of the Act of June 10th, 1918 which would have given him forty dollars a months, but which I assume he never drew because they are only paid quarterly.

Q. Now his wife made an application in August, 1918, did she not, for a pension?

A. Yes, sir.

Q. Now as his surviving widow she commenced to draw a pension as of the date she filed the application in August of 1918, did she not?

A. August 9th, 1918.

Q. She commenced to draw a pension as his surviving widow as of August 9th, 1918.

A. Yes, sir.

Q. And how much did she draw from and after that date how much per month?

A. $25.00 per month.

Q. She is drawing that now?

A. The rate was increased to thirty by the Act of May 1, 1920.

Q. And she is drawing thirty now?

A. Yes sir.

Q. You were asked by Mr. Norvell if from the investigation you [fol. 361] have made of the records, if you didn't find in a great many instances where a man represented himself to be eighteen years of age whereas in truth and in fact he was younger than that, and I believe you answered in some instances you found that to be true.

A. Yes, sir.

Q. That was, you are speaking now about the Federal Union Soldiers?

A. Yes, sir.

Q. That was particularly so in states like Michigan and these northern states, was it not?

A. Well I have no knowledge of any difference in localities.

Q. I will ask you this question, if in the investigations that you made have you ever found a case from, Alabama, a native born Alabamizan having represented himself to be as high as eighteen when in truth and in fact he was less in order to get into the Union Army?

A. I personally have no knowledge or recollection of it.

Q. You never found any case like that?

A. No, sir.

Q. Did you ever find any in Georgia, South Carolina or Mississippi, or any of the other southern states?

A. I can't say.

[fol. 362] Redirect examination:

Q. Mr. Dennis I asked that last question from personal knowledge or investigation, let me ask you from the standpoint of departmental investigation whether the mountaineers of East Tennessee and Northern Alabama or Western South Carolina were wrong or not in joining the Union Army instead of the Confederate Army, I will ask you whether or not there was any difference in the question of their endeavoring to get into the Army *evey* by misrepresentating their age than they were in other parts of the country where you stated that there was a difference?

A. None to my knowledge.

Further this deponent saith not.

[fol. 363] T. A. CLARKSON, called for the plaintiff, being duly sworn, deposed as follows:

Direct examination.

By Mr. Norvell:

Q. This is Mr. T. A. Clarkson?

A. Yes, sir.

Q. You are the secretary of the Nashville, Chattanooga and St. Louis Ry.?

A. Yes, sir.

Q. And have been for some years?

A. Yes, sir.

Q. You were a member of or kept the records of the pension body or board of that railroad?

A. I was secretary of the pension board also.

Q. Now Mr. Clarkson when a man is retired from the service of the company, that is, I mean any retirement you have not resulting from any disability, but when he is retired in the usual course, how many years does he have to serve with the company before he is entitled to a pension?

A. Well, he is retired, he is not retired unless he is *incapacited*.

Q. I was trying to distinguish from being knocked up in a wreck from being retired on account of age?

[fol. 364] A. I don't know of any that have been retired purely on account of age, they are retired if they are *incapicated*.

Q. Just put it this way, I don't know your custom, when they are retired whether it be from age or anything else, how long is the rule that they should serve with the company before they are entitled to a pension?

A. Twenty years before the age of 61, ten years after the age 61.

Q. Mr. Clarkson, what is the compensation paid them as a pension, I mean by that, what is the basis of the compensation.

Mr. Walker: I object to that on the ground that the deceased don't fall within the purview of a pension. You are undertaking to show that he wasn't disabled and Mr. Clarkson has testified that they never pensioned any on account of age.

By Mr. Norvell: Of course if they agree that he could run that engine until he was eighty it would be to no purpose, but I gather they will argue that before his death that he would become incompetent by age, therefore I think I can show where a man has served ten years that the company will pension him.

Objection overruled. Defendant excepted.

[fol. 365] Q. I say, what is the basis of the computation Mr. Clarkson?

A. The pension is threshed out by the pension board and it is entirely with the pension board of course whether it grants the pension at all or not.

Mr. Walker: I object to that because immaterial. It is not an expectancy, it is an optional thing.

Mr. Norvell:

Q. In view of that voluntary statement let me ask a question or two before the Court rules which might straighten several statements you are making. If a man has been a faithful employe for over twenty years, without any reason will it be said that John Smith can't have a pension and Bill Jones can? Is the matter entirely discretionary?

A. Bill Jones could have a pension if he was in good standing with the company, but the other man couldn't if he had a bad record or *incapicated* on account of vicious living, or any reason why he shouldn't have.

Q. Did Mr. D. C. Kennedy have a bad record with the company?

A. I am not in the operating department so I can't say.

Q. Had Mr. D. C. Kennedy on July 9th, been incapacitated from running an engine by bad habits?

A. Not that I know.

[fol. 366] Mr. Norvell: I asked one of my other witnesses whether he had made a faithful employe and it had been ruled out.

Mr. Walker: There is no proof here to show what would be the result. It is certainly speculative what would happen in the event Mr. Kennedy hadn't died, from the date of his death to the time he might be eligible for a pension, therefore it is speculative. He said it is entirely optional with them in their discretion and you can't assume. You can't tell what would happen from the time Mr. Kennedy was killed if he had lived until his employment ceased, nothing to tell.

Objection sustained.

The jury here retired.

By Mr. Norvell:

Q. Mr. Clarkson, as I understand you——

A. I might amplify what I said by stating a point I remember, that is, one employe who had had a pension for some time showed symptoms of disloyalty to his company. Although he had been on the pension roll for sometime we investigated and found that there [fol. 367] was really some reason for it and we considered taking his pension away from him, and would have but we concluded it was a small pension and the offense was immaterial, but we hold the same right over pensions that we do over employes.

Q. Then as I understand, the custom built up from what has happened in the past is this, that where a man 61 years of age has worked 20 years for the company, or where a man 70 years of age has worked ten years?

A. Was it seventy or seventy one?

A. In case of an engineer who is 65 *who is* 65 let us confine it to the instance, as I understand the custom built up from what has happened in the past in your pension board is briefly this, that where an engineer has reached the age of 61 years and has been with the company for over twenty years, or where he has reached the age of sixty five and has been with the company for ten years and in either or rather in both cases has been a faithful employe with not a bad record, and a disability which results is not due to bad habits of his own, your board gives him a pension?

A. Yes, sir.

Q. You reserve the right to revoke that pension?

A. Yes, sir.

Q. If they are disloyal and in one case you came *might* near exercising that right but didn't quite do it, is that about the size of it? [fol. 368] A. Yes, sir.

Q. How many employes has your railroad got, a great many?

A. Ten thousand, around that.

Q. Now then, Mr. Clarkson, hasn't it been the uniform custom where a man has been retired from incapacity resulting from accident, disease, or old age, or whatever the cause of incapacity may be that if he has attained these ages and has had that length of service he has been given a pension unless his record is bad or unless bad habits brought on the disability?

A. That has been the custom.

Q. That has been the uniform custom?

A. Yes, sir, that has been the custom.

Q. And not only has it been the custom of your road to pension those men who left your service on account of incapacity before the Government took control, but it has also been your custom where they reached the ages and served the requisite number of years to grant a pension since the Government control?

A. Yes.

Q. This compensation that is paid your retired employes is based is it not by multiplying one per cent of the average earnings for the

ten years preceding retiring by the numbers of years of service in the roads employ, isn't that the general rule.

A. Yes, as I understand your statement there, we take [fol. 369] the average pay for ten years and multiply that on a percentage basis, using the year and adding the percentage, and that gives us the pension.

Q. In other words, to have a concrete case if Mr. Kennedy had lived and if he had the proper sort of record and had been retired in due course for disability and had worked forty seven years in granting the pension you would have multiplied one per cent of his earnings for the last ten years by 47 years, or, I don't want to ask you about Mr. Kennedy, I will put it John Smith.

A. The way you put it, it is a little clearer this way, if he worked 47 years and his average pay was $100.00 a month for ten years he would get one per cent of the $4,700.00 or $47.00 per month.

Q. I want to ask you furthermore, Mr. Clarkson to save time, as the Court has ruled this can't go to the jury anyway, the records of the company are accessible to you as the secretary?

A. Yes, sir.

Q. You are really the legal custodian under your by-laws?

A. Yes, sir.

Q. Will you kindly investigate to see whether Mr. Kennedy had any such bad record or was guilty of such disloyalty, or was guilty of such habits at or about the time of his death as under your usual [fol. 370] custom would have prevented the board from giving his a pension?

Mr. Walker: There is no insistence about that. I don't know but I naturally assume that.

A. You understand those records come to me after they are prepared and ready for consideration and I look over them and if there is anything missing I see that that is done, but I never prepare the papers, they are prepared by the different departments.

Mr. Norvell: Will you stipulate that Mr. Clarkson will testify that.

Mr. Walker: I couldn't stipulate that.

Mr. Norvell:

Q. Will you kindly get the records and return to the stand in the morning and testify, I am trying to save time.

Mr. Walker: So am I. I don't know whether Mr. Clarkson would be able to do that.

By the Court: Would you be able to determine whether the board would grant a pension after you make this investigation?

[fol. 371] A. No, sir, I would not. That is not my prerogative and I would be presuming to get up the reputation, he being in the operating department. It would be a question for the board itself to pass on, the pension board to pass on.

Mr. Walker: He would be assuming to act upon the record and life of a man from the time he died up to the time he is due to get a pension that never existed.

Mr. Norvell: Your Honor has ruled on the proposition and ruled it out and I think I ought to be allowed to complete my record.

A. You see that is for our mechanical department or operating department, if for certain reasons Mr. Kennedy desired a pension, we have an investigation of his record to see if he is entitled to it.

By the Court: How long would it take?

A. I don't know how voluminous it would be — how long it would take. It frequently takes a month.

Mr. Norvell:

Q. Who is immediately in charge of the operating department?

A. Mr. Bruce.

Q. He would not be letting a man run on one of your highest passenger trains who had such a bad record or who was disloyal that he would not be allowed a pension by the board, don't you know [fol. 372] that?

A. Here is the thing——

Q. Don't you know the road as a custom is more careful of the lives of their passengers that it is about paying this $47.00 a month?

A. We grant pensions on statements of facts the chief paper in that is the medical examination, we can't get that, and that would make it incomplete.

Q. Don't the operating department of your road determine whether or not a man runs an engine upon the facts of his record.

A. If you want the facts of the record and not bring in the pension department, if you want the facts of his having got a record go to the operation department because the pension department covers all departments, and in this case I couldn't give you a complete record, I haven't got it, I don't suppose, a single file that does not show a surgeon's examination, therefore it would be incomplete.

Q. Aren't you the secretary of the company?

A. Yes, sir.

Q. And under the by-laws the custodian of the books and papers?

A. I don't have anything to do with that.

Q. What do your by-laws say?

A. The by-laws say I will have custody of deeds, contracts and other valuable papers.

[fol. 373] Mr. Walker: I object to that. I don't think he ought to ask Mr. Clarkson, who is the secretary of the company and in whom is vested the custody of all legal papers pertaining to the company's business, to go into an investigation of this matter that Mr Clarkson says will take how long?

A. Well, possibly about two or three weeks by rushing it. Some of our pensions take two or three months. Here is another thing,

Mr. Kennedy is dead and after we investigate as to a man's life, primarily he must fill out a blank and sign his name to it.

Mr. Norvell:

Q. I am trying to get something that appears to me very plain from some course, if you can't give it to me, kindly listen to me and tell me who can. First, who would have the right, custody or possession of the records, or would know whether or not Mr. Kennedy has a bad record as an engineer of your company, who is the man I should subpœna?

A. Mr. Bruce, General Manager of the operating department or his subordinates.

Q. Now Mr. Clarkson, if you are not the man, then who is the official of your road that has possession of the records which would [fol. 374] either show or fail to show, or should show, if it existed, that Mr. Kennedy was guilty of disloyalty towards the company, or that at the time of his death or any longer time approaching thereto was guilty of such bad habits as would reasonably contribute towards his disability, who would have such records where the records would show such facts?

A. If there are such records they would be in the operating department.

Q. Is that Mr. Bruce.

A. It might be Mr. Bruce, or it might be the mechanical department might have some in their office, and Mr. Kelsey at Chattanooga might have some, and Mr. Templeton might have some in his office.

Mr. Walker: I would like to ask Mr. Clarkson a few questions, I think I can clear it up.

By the Court: Go on.

Mr. Walker:

Q. First, who constitutes the pension board?

A. The chief surgeon, the chief engineer and Comptroller the Superintendent of Machinery and the General Manager.

Q. When you go to arrive at the question whether a man is or is not entitled to a pension what in the way of evidence is obtained, [fol. 375] what records and what men do you have before you and what do you ascertain about whether or not the pension should be granted or denied, the application denied?

A. The head of the department, the party making the application for the pension must make it in writing. He will go to the head of the department and he will give him a blank to fill out giving a history of his service with the company and the reasons why he is applying for a pension. Then the head of the department takes that and checks the record or had it checked.

Q. What record does he check, that is the point?

A. First he checks the payroll to see how long he has been with the company, again he checks the payroll to see what his position is, when he sends the man to the Chief Surgeon to be examined, then an

entry is made as to the man's mode of living. Sometimes the papers are sent to the other departments where he has been and his entire history is gotton up. That is gotten up by the man he works for.

Q. Is there any contract existing between the company and the employes by the terms of which at any time at the expiration of their ability to perform service, *or in case of their disability due to* injury or old age to grant them a pension or not grant them a pension, is there any contract existing?

A. Absolutely none.

[fol. 376] So then that is a matter that is entirely and arbitrarily within the discretion as to whether the company in consideration of faithful service rendered them will return compensation to the employes or not?

A. Yes, sir.

Q. So irrespective of what the employes might have been, irrespective of whether he was loyal or disloyal, whether he had made a bad or a good emplove, whether he is old or young, whether he is injured or uninjured, it is all with just what the pension board wants to do, is it not?

A. Absolutely within their discretion.

Q. If a man has got the most meritorious kind of a claim for a pension the company for any reason they see fit and proper can disregard it.

A. They can.

Redirect examination:

Q. Have they ever done what you say they can do?

A. No, sir.

Q. That is not the custom, you are just stating what they can do, if they wanted to.

A. Yes, sir.

Objection to the evidence sustained.

Plaintiff excepted.

Mr. Walker: We don't know of any act of disloyalty that Mr. Kennedy was guilty of, or of any bad conduct or *or* bad faith or bad [fol. 377] habits, on his part towards the company. So far as the officers will tell you, if you had a hundred of them here, I don't guess you could prove any more than that so far as they know.

Mr. Norvell: For the purpose of getting it in the record, if it was stipulated the proper officer would testify that, that is sufficient for me. It is not before the jury any way.

Mr. Walker: As the representative of the defendant railway I will state that as far as I know the officials of the company know of no act of disloyalty or bad faith or bad habits at the time of deceased's death, or bad record on his part.

Mr. Norvell: That is what — expect to prove if we were allowed to put on the proper officer.

Further this deponent saith not.

Court adjourned until morning.

[fol. 378] October 26, 1920.

By the Court: I will exclude the evidence of Mr. Clarkson from the consideration of the jury. The statement of the witness shows that it is not certain that the deceased, Kennedy, would have received a pension, and he speaks now and can only speal for the present board. As to who would constitute this pension board when deceased might have applied for a pension, and what said board would have done is very uncertain. We have no way of knowing anything about the conditions and circumstances of deceased Kennedy that is, at a later period after July 9th, 1918, or what this pension board or any other board might do when application should be made. The entire matter in the opinion of the Court enters too much into the field of speculation to be competent evidence.

Plaintiff excepted.

The jury is present in court.

[fol. 379] J. P. Eubanks, recalled for further cross examination, deposed before the jury as follows:

Mr. Walker:

Q. Mr. Eubanks, when you were on the witness stand heretofore as I now recall, you testified both on direct and cross examination that on the morning of July 9th, 1918, when No. 4 was pulling out of the yards in the direction of the shops that somewhere between the Charlotte Pike crossing and the Tennessee Central overhead bridge that you passed a train of some description, you do not know what it was, is that correct?

A. This side of the Charlotte Pike crossing Mr. Walker on this side.

Q. On this side?

A. Yes, sir, you might say between another little pike crossing there, Clifton Pike I believe.

Q. It was between some pike and the overhead Tennessee Central Bridge?

By the Court: The Charlotte Pike, this side of the Charlotte Pike crossing you say?

A. Yes, sir, that is it.

Mr. Walker:

Q. Well, at any rate wherever you did pass it was on a straight line at that point?

[fol. 380] A. Yes, sir.

Q. No. 4 was on the outgoing main and this train that you passed whatever it was, was on the incoming main?

A. Yes, sir.

Q. Did you go over that road on last Saturday, on an engine with a crew?

A. Yes, sir.

Q. You were in company with the engineer and fireman and the photographer and myself?

A. Yes, sir.

Q. Were you present when a picture was taken showing the point about at which you say you passed this train that morning?

A. Yes, sir, I was out on the ground there.

Q. Did you see the photographer take a picture of the double track looking in the direction of the shops from Nashville?

A. Yes, sir.

Q. I show you a picture that has a little house, a tower house shown in it with a double track and with a bridge running overhead above the track and will ask you to state whether or not you were present when that picture was taken?

A. Yes sir.

Q. You passed that engine or train or whatever it was——

[fol. 381] A. Yes, sir.

Q. That you say you thought was No. 1 between there the camera was standing and a point between that over head bridge, did you not, the first overhead bridge shown in the picture?

A. Yes, sir, just above this tower there.

Q. I would like for you to file this picture as Exhibit No. 7 to your evidence and pass it to the jury?

A. I will.

Q. Now Mr. Eubanks from the point where the camera was standing on to and past the bridge going in the direction of the shops is up grade is it not?

A. Yes, sir.

Q. And when a train is going up grade it necessarily requires more steam and necessarily the fireman has to be at work preparing for the grade and working on the engine while the train is going up grade, does he not?

Objected to proving what the custom is.

Question withdrawn.

Q. The engineer as he goes out, he is on the right hand side is he not?

A. Yes sir, supposed to be.

Q. And train No. 1 whenever it came in had an engine in front with the engine number on the boiler of the engine, did it not, on the front part?

A. Yes, sir, a number plate.

[fol. 382] Q. A number plate?

A. Yes, sir.

Q. There is nothing at any point down there to obstruct the view of an engineer to see the engine number on an incoming train is there?

A. No, sir.

Q. Now looking under this bridge, I see a tower, do you see that?
A. Yes, sir, I see it.
Q. That is the shop tower is it not?
A. Yes, sir, it is the shop tower.
Q. This was a clear bright day in July with the sun shining was it not?
A. Yes, sir.
Q. And this was so at the time the train was pulling out and until the wreck?
A. As well as I remember it was as bright here as it was where the wreck occurred.
Q. The sun was shining and hot too, do you recall that?
A. Yes, sir.
Q. You don't remember a cool day in July?
A. No, sir.

Redirect examination.

By Mr. Norvell:

Q. Mr. Eubanks, as I understand this picture was taken Satur-
[fol. 383] day in your presence, or you and some other gentleman went out at the request of the defendant, that is correct?
A. Yes, sir.
Q. You went out there at their request, you didn't go at our request, you went at the request of the defendant?
A. Yes, sir.
Q. Mr. Eubanks when you were on the stand before, *by* recollection is a little faint, but one matter I would like to ask you again, you stated to Mr. Walker as I recall that you were slightly hurt in the lower part of the leg by a suit case or something striking your leg when the emergency brake was put on, you said that, didn't you?
A. I don't remember saying whether the brake was put on or whether the lick was made.
Q. I understood you to say however, and I want you to tell me now what was the fact, I understood you to say you were injured by a suit case when the brake was put on, I am not particular about your injury, that is not involved in this lawsuit, the emergency brake was put on?
A. Yes sir.
Q. How long after the emergency brake was put on did the collision occur?
A. It was all right together Captain, the brake was put on long enough ahead of the lick to lunge me backwards, and I kind of grabbed at the back of a seat.
[fol. 384] Q. It lunged you back and then the collision occurred?
A. And then they hit.
Q. Mr. Eubanks as I understand, that picture that Mr. Walker has filed is made with the camera looking West, that is right?
A. Yes, sir, looking up the hill.

Q. This tower here on the right, is that what is called the shop tower?

A. No, sir.

Q. What tower is that?

A. That is a little tower down here at this pike crossing, I have forgotten the name of the pike, a little pike crossing where they let the gates down.

Q. We see a bridge here, what is that?

A. That is the Charlotte Pike, supposed to be.

Q. The shop tower is *very* beyond that beyond the shops?

A. Yes sir.

Q. Now where was it, the train that you passed or the engine that you passed that morning was somewhere towards town from this crossing, is that the idea?

A. From this bridge, this overhead bridge is what I identified where I was at by.

Q. This overhead bridge is the only one shown in this picture.

A. Yes, sir, I said that is the one.

[fol. 385] Q. It is the only one show in this picture.

A. Yes, sir.

Further this deponent saith not.

By Mr. Norvell: May it please the Court, when Dr. McCabe was on the stand we read into the record the life expectancy of an average person as computed by the Carlisle Table according to the ages of Mr. and Mrs. Kennedy, how I think it proper and I presume counsel will agree to this, that we may consider the Carlisle Table in the record for any particular age the parties want to argue from, that the proof shows the ages are. The Carlisle Table is set forth in Section 1072, page 855 of Gibson's suits in Chancery. I think that is fair to both parties.

Mr. Walker: That is all right.

Mr. Norvell: Mr. Walker has filed the rule book of the N. & C. Railroad and from time to time he and I have asked about the different rules and they were read into the record. Now I have a [fol. 386] collation here of the rules on which we depend. I think it would be proper to read them into the record and not simply refer to them as an exhibit. I am willing for it to go in and any one of us can read any rule.

By the Court: The whole book of rules is in the record and that covers everything.

Mr. Norvell: You just file the general book. However with the understanding it is all right, with the right and privilege of course to read any part of it to the jury.

Mr. Walker: Yes, sir.

Plaintiff here rests in chief.

[fol. 387] The Jury retired.

MOTION FOR INSTRUCTED VERDICT AND ORDER OVERRULING

By Mr. Walker: May it please the Court at the conclusion of the plaintiff's evidence the defendants, John Barton Payne Federal Agent, and the N. C. & St. L. Railway move the Court to instruct the jury to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced that no verdict in favor of the plaintiff is justified.

In addition to that general ground, the defendants move the Court to peremptorily instruct the jury to return a verdict in favor of both defendants on the ground that the evidence shows without dispute that the primary and proximate and only negligence shown in the proof is that of the deceased.

Then in addition to the motion for peremptory instructions on behalf of both defendants, I want to move the Court to peremptorily instruct the jury to return a verdict in favor of the N. C. & St. L. Railway on the ground that the undisputed proof shows the death of the deceased and the accident which brought about his death, for which this suit is brought occurred at a time when the N. C. & St. L. [fol. 388] Railway was not operating the trains and cars that caused the deceased's death, but the proof shows that they were being operated by the United States Government, and therefore, under the recent Act of March 1920, known as the Cummins Esch Bill that no recovery can be had against a railway for an accident or alleged negligence growing out of Government control.

Which motion was overruled and disallowed, to which action of the Court the defendants then and there excepted.

Mr. Walker: The defendants move the Court to peremptorily instruct the jury at the conclusion of the plaintiff's evidence to return a verdict in behalf of both defendants upon all of the counts of the declaration, and particularly the first count, the third count, the fourth count and the fifth count.

Objected to by the plaintiff because after motion for peremptory instructions is overruled you cannot make any other motion under the State practice and the State practice controls.

[fol. 389] Motion overruled to which the defendants then and there excepted.

Thereupon the jury returned into Court.

[fol. 390] DEFENDANTS' EVIDENCE

A. F. MCCONNELL, called for the defendants, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Walker:

Q. Mr. McConnell, you are chief law agent for the N. C. & St. L. Railway are you?

A. Yes, sir.

Q. Do you know anything about when it was that Mr. Sinclair who was the flagman on No. 4 left the employment of the railway company?

A. My understanding is that he never worked after the 9th of July, 1918.

Q. Since the wreck and particularly since this suit was brought what efforts have you made endeavoring to find out the whereabouts of Mr. Sinclair.

A. I made inquiry amongst the railroad men and at the superintendent's office. He keeps a record of the residences of the men.

Q. About how many different men have you and myself together talked to trying to locate him?

A. I suppose a dozen or more.

Q. Since this case has been going on what efforts have you made to ascertain his whereabouts?

A. I have inquired amongst all the men that he came in contact [fol. 391] with in the train service, and at the Superintendent's office and the Clerks, as to the whereabouts of Mr. Sinclair, and none of them could tell us anything about him.

Q. State whether or not a letter was properly addressed to Mr. Sinclair at his last known address, and whether or not that was returned?

A. Yes, sir, that is true.

Q. He is now in the employment of the company.

A. No, sir, he is not.

Q. And after diligent search you have been unable to find his whereabouts?

A. That is true.

Further this deponent saith not.

[fol. 392] JAMES A. FAHEY, called for the defendant, being duly sworn, deposed as follows:

Direct examination.

By Mr. Walker:

Q. Mr. Fahey, what position do you hold with the N. C. & St. L. Railway?

A. Traveling engineer.

Q. Did you hold that position with the Government during the Government control?

A. Yes, sir.

Q. The whole time?

A. Yes, sir.

Q. How long had you been in the N. C. & St. L. Railway employ before Government control?

A. Well, about thirty years I guess.

Q. Then prior to this accident you were employed by the railway for about twenty-eight years?
A. Yes sir, about.
Q. What are your duties as Traveling Engineer?
A. Well, I ride the locomotives to instruct the men in the proper operation of them, find the defects in a locomotive and have them corrected.
Q. Have you ever pulled train No. 4 the one Mr. Kennedy was pulling?
[fol. 393] A. I have pulled s-hedule Ni. 4 out of here, yes sir.
Q. Have you ever acted as engineer or Traveling engineer in connection with Mr. Kennedy at the time he was pulling train No. 4?
A. Any number of times.
Q. If you know, state what was the custom and practice between engineers and conductors, and particularly Mr. Kennedy, with reference to the conductor and those on the rear part of the train relying upon the engineer to ascertain and identify the arrival of such a train as No. 1?

Mr. Norvell: We object to that on the ground first, it is a question of fact what happened between Eubanks, secondly the gentlemen can't override these rules and duties by a custom that happens at some other times. The rules state themselves. It must be a positive fact and agreement, not as to some custom.
Mr. Walker: All the rules do is to establish a custom.

Objection sustained.
Out of the hearing of the jury the witness answered.

A. Well, it was my observation while riding this train with Mr. Kennedy that the conductor relied more or less on him. In other [fol. 394] words, on any number of times, I can't give the specific dates or days, I have stopped Mr. Kennedy at the shop because in riding the engine I didn't identify this No. 1 which was a superior train, and got the information that it had arrived. Whether or not the conductor got any information I can't say. He was never in evidence at any of these particular times.

Cross-examination waived.
Further this deponent saith not.

Mr. Walker: May it please the Court he has answered in the absence of the jury and I now offer that testimony and ask that it go to the jury.
Mr. Norvell: I want the Court to listen to that answer before he passing on that.

The jury here retired.
(Answer read to the Court.)

Mr. Walker: The point I want to make is if the Court is wrong in excluding it, in order to get the Court in error about it I have got to offer for it to go to the jury.

[fol. 395] By the Court: I thought the testimony of Mr. Eubanks on that question was competent. He stated that he had previously had an agreement with Mr. Kennedy, that Mr. Kennedy would look out after No. 1, he so stated, a number of times, but as I recall, Mr. Eubanks did not state that he had that agreement that morning, but I allowed that to go to the jury believing it to be competent that the jury might possibly have a right to infer that they had such a general understanding that it would be observed on the morning of the accident whether they had an express understanding that morning or not. Now the testimony of this witness is excluded because it undertakes to establish a custom which would have a tendency to destroy the effect of the rules of the company that relieve an employe of the railroad from his duty imposed upon him by the rules of the company, and the company can't escape liability in that fashion as I see it.

Mr. Norvell: To furthermore complete the record from my standpoint I want to further object to the answer that the answer is entirely incompetent because in addition urged to the question all this answer says, from what he say- it looked like, or the fact was, that the parties in the rear more or less relied on the conductor. And getting down to the plain facts, all he states is that on occasions when [fol. 396] he had ridden and stopped the train at the shops he didn't notice the conductor come forward.

By the Court: That is true. He has moved to let it go before the jury and I have overruled the motion and he has excepted.

Mr. Walker: I have two more witnesses by whom I want to prove that they are conductors in charge of train No. 4 which met train No. 1 under similar conditions, and that it was their custom with the engineers, and particularly Mr. Kennedy to rely upon him to ascertain and identify the arrival of train No. 1. Now of course the Court is holding that incompetent and it just saves time.

Mr. Norvell: Call them and get it in the record.

SAM BOMAR, called for the defendants, being duly sworn, in the absence of the jury testified as follows:

Direct examination.

By Mr. Walker:

[fol. 397] Q. Mr. Bomar, you are a conductor on the N. C. & St. L. Ry., are you?

A. Yes sir.

Q. You now are conductor on train No. 4?

A. No. 4 and 5.

Q. Train No. 4 leaves Nashville at 7 o'clock and is the same train as that which left on the morning of July 9th, 1918, from Nashville to Hickman, Kentucky, isn't it?

A. Yes, sir.

Q. Now prior to July 1918, as conductor while you were on train No. 4 and a similar train what was the custom and practice between you and other conductors between the engineers pulling such a train as train No. 4 and particularly Mr. Kennedy with reference as to whether or not between the Union Station and shops whether the conductors and yourself would rely upon engineers to ascertain and identify the arrival of No. 1?

A. I don't know what the other conductors were, but mine was to rely on the engineer to identify the train with the number of the engine it had.

Mr. Norvell: I object to that as above, and also on the further ground that what he relied on has nothing to do with Eubanks and Kennedy.

[fol. 398] Objection sustained.

Defendant excepted.

Cross-examination.

By Mr. Norvell:

Q. You run with Kennedy before the accident?

A. Yes, sir.

By the Court: That is a close question gentlemen, but I really don't believe it is competent.

Further this deponent saith not.

[fol. 399] T. J. RIGGLE, called for the defendants, being first duly sworn, in the absence of the jury, testified as follows:

Direct examination.

By Mr. Walker:

Q. Mr. Riggle, you are now in the employ of the N. C. & St. L. Railway are you?

A. Yes, sir.

Q. You have been for how many years?

A. I was with the N. C. & St. L. Railway thirty eight years and a half in train service.

Q. How long have you been a conductor?

A. Thirty three years.

Q. How long have you been a passenger conductor?

A. Somewhere between fifteen and eighteen years.

Q. State whether or not previous to July 9th, 1918, and at and about that time, whether or not you were conductor on a train such as No. 4 that pulled out from the Union Station on the morning of July 9th, 1918?

A. Yes, sir.

Q. I want you to state to the Court what was the practice with reference to that of the conductors relying upon the engineers to identify the arrival of train No. 1 at that time, particularly the en-
[fol. 400] gine between the Union Station and shops?

A. As a practice so far as I know, we relied upon the engineer. As a rule we began checking, as a rule, leaving the Union Station.

Q. Mr. Kennedy had pulled out I believe?

A. Yes, sir, I had railroaded with him several years.

Q. That practice applicable to him as well as to other engineers?

A. Yes, sir.

Same objection and same ruling.

Mr. Walker: We offer this testimony and ask the Court to permit it to go to the jury, the testimony of Mr. Riggle and that of Mr. Bomar the witness who has just preceded him.

Motion overruled and defendants excepted.

Defendants here closed and the plaintiff doth likewise.
This was all the evidence in the case.

MOTION FOR PEREMPTORY INSTRUCTIONS AND ORDER OVERRULING

By Mr. Walker: Now may it please the Court, at the conclusion of all the evidence in the case, the defendants John Barton Payne, Federal Agent, and the N. C. & St. L. Ry. move the Court to instruct
[fol. 401] the jury to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced that no verdict in favor of the plaintiff is justified.

In addition to the general ground, the defendants move the Court to peremptorily instruct the jury to return a verdict in favor of both defendants on the ground that the evidence shows, without dispute, that the primary and proximate and only negligence shown in the proof is that of the deceased.

The in addition to the motion for peremptory instruction on behalf of both defendants, I want to move the Court to peremptorily instruct the jury to return a verdict in favor of the N. C. & St. L. Railway on the ground that the undisputed proof shows the death of the deceased, and the accident which brought about his death, for which this suit is brought occur-ed at a time when the N. C. & St. L. Railway was not operating the trains and *case* that caused the deceased- death, but the proof shows that they were being operated by the United States Government, and therefore, under the recent Act of March 1920, known as Cummins Esch Bill, that no recovery can be had against a railway for an accident or alleged negligence growing out of Government control.
[fol. 402] Which motion was overruled and disallowed, to which action of the Court the defendant then and there excepted.

By Mr. Walker: The defendants move the court to peremptorily instruct the jury, at the conclusion of all of the evidence, to return

a verdict in behalf of both defendants upon all of the counts of the declaration, and particularly the first count, the second count, the third count, the fourth count and the fifth count.

Objected to by plaintiff because after motion for peremptory instruction is overruled you cannot make any other motion under the State practice and the State practice controls.

Objection sustained and motion overruled, to which action defendants then and there excepted.

Thereupon the jury returned into Court.

The case was then argued by counsel for both Plaintiff and defendants. In the course of the argument in pursuance of the stipulation made at the close of plaintiff's proof to the effect that the Carlisle Table, as shown in Gibson, might be considered in the [fol. 403] record, counsel for the plaintiff explained that the figures used in the examination of Dr. McCabe were those relating to the value of an annuity of $1.00 at 6%, at the ages therein mentioned, inadvertently used instead of the figures showing the expectancy of life at the different ages, and then counsel proceeded to read from the Carlisle table in Gibson the expectancy of life of the deceased, his widow and the beneficial plaintiffs and the figures showing the value of an annuity of $1.00 at 6%, at the ages of the widow and beneficial plaintiffs, as same are set forth in Gibson's suits in Chancery, second edition.

After argument of counsel, the Court charged the jury as follows:

[fol. 404] IN CIRCUIT COURT OF DAVIDSON COUNTY

[Title omitted]

CHARGE TO THE JURY

Declaration

GENTLEMEN OF THE JURY:

The plaintiff has sued the defendants in this case for $25,000.00 damages, and the substance of the declaration, which has been read to the jury, is as follows:

The said declaration contains five separate counts, each count containing a separate, specific and distinct allegation of negligence.

Each count charges that Mary C. Kennedy is the widow of the deceased David Kennedy, who was killed on July, 9th, 1918, that she is administratrix of his estate, and that he left surviving him certain children, and that she sues for the benefit of herself and said children. Each count contains certain other allegations of a technical character with reference to the defendant Railway Company, as to its corporate nature as well as its connection with Walker D. Hines, Director General, and John Barton Payne, Agent, etc, which are not necessary to repeat in detail.

[fol. 405] The first count charges that on July, 9th, 1918, deceased, David Kennedy, was in the employ of the defendant Railway Company as engineer on a passenger train, engaged in interstate commerce, etc, that on said day he was proceeding from Nashville in a westerly direction along a route which included stations shops and Harding, that he was in his proper place in the can on the right side of his engine, that at a point between Shops and Harding a collision occurred between the train proceeding toward Nashville, that said collision was not due to any negligence and carelessness of the fireman on the engine with deceased, in that it was his duty to observe approaching trains and to report the passing of superior trains, and that he negligently failed to look ahead and warn deceased that superior train No. 1 had not passed before arriving at shops.

The second count charges that the collision of superior train No. 1 and No. 4, engine of the latter being operated by deceased Kennedy, was caused by the negligence of the conductor on train No. 4, in that said conductor before going out on the main track at Shops failed to observe that No. 1 had not passed and negligently failed to warn deceased to that effect.

The third count charges that said collision of trains 1 and 4, as [fol. 406] aforesaid, was caused by the negligence and carelessness of other employe-s and particularly the operator at Shops who had charge of signalling trains at that point and who failed to signal intestate's train to stop.

The fourth count charges that on the day No. 4 left Nashville the train was crowded and the conductor was busy taking up tickets, that it was his duty to have No. 4, stop at Shops and let No. 1 pass. That the flagman was guilty of negligence in that he had read the conductor's train orders, that he knew the conductor was busy and could not well observe and take notice of what the trains had passed; that the flagman knew or should have known that No. 1, had not passed, and he negligently failed to notify his conductor that said train had not passed before reaching Shops, said count further charges that it was the duty of the flagman to protect the rear of train No. 4, *the* he negligently failed to be at his post in the rear and heed a signal to stop, given by the operator at Shops after No. 4 had passed said point.

The fifth count charges that said collision was caused by the *b*egligence of the defendants in — e-ploying a flagman who fully understood his duties; that flagman No. 4, on the day of the collision was not experienced and he failed to carefully look out for passage of No. [fol. 407] 1, that by reason of his failure to understand his duties he did not remind the conductor so that said conductor did not stop the train by the use of a certain angle cock etc.

Now, gentlemen, the above sets out plaintiff's various allegations of negligence in the five counts of her declaration.

Plea of Defendant- and Effect

The plea of the defendants is not guilty, the legal effect of this plea is, to deny each and every material statement or charge in the

declaration and to cast the burden of proof upon the pliantiff to prove the case substantially as alleged in the declaration by the preponderance of all the evidence in the case before any recovery can be had.

Preponderance of the Evidence Defined

The preponderance of all the evidence means the greater weight and valye of all the evidence in the case.

In ascertaining whether or not the preponderance of all the evidence is on the side of the plaintiff, you will not be guided alone by the number of witnesses who have testified in favor of or against either party, because evidence must be considered and weighed with reference to its value, and not merely with reference to the number of witnesses in weighing the evidence of witnesses you should consider their intelligence, and motives, the means of knowing whereof [fol. 408] they speak, the reasonableness or unreasonableness of the testimony given the interest or lack of interest that any witness may have manifested in the result of this cause, the relationship, if any, whether by blood or marriage or business associations between any witness and either of the parties, together with his appearance and conduct while on the witness stand, and any other circumstances that may show a leaning toward one side *of* the other.

Impeachment of Witness

If any witness has become involved in material contradictions on cross examination or has otherwise behaved in such manner as to make you doubt *his* testimony of such witness or any part of it, is strictly a matter which the law leaves to the sound discretion of the jury, who may accept or reject any part, or all of such testimony according to the defree of its credibility.

If after carefully considering and weighing all of the evidence you should believe that the true facts of the case have been proven by either party, though testified to by only one or more witnesses your verdict should be in favor of that party.

Proximate Cause Defined

[fol. 409] The proximate cause of an injury is that act or omission which immediately causes, or fails to prevent an injury, that is to say, it is the act or omission preceeding the accident without which the injury would not have been inflicted.

Inference that May be Made

Where a material fact has been proven by a party from which it is reasonable to infer another fact which may throw some light on the situation, it is proper for you in your effort to arrive at the truth of the matter, to draw all natural and reasonable inferences from the proven facts, but it is not proper to infer a thing to be

true merely because some other thing is inferred or supposed to be true.

Duties of the Court and Jury

It is the duty of the court to instruct the jury as to the law of this cause, and it is your exclusive duty to weigh the evidence and to find the facts. It is for you to judge of the credibility of the witnesses and to reconcile all conflicts and discrepancies, if any, in their testimony upon the supposition that all of themselves spoken the truth, if you can do so, but if you cannot do this, then it is your duty to believe the evidence which you think more worthy of credit and to ignore such evidence as you cannot believe.

Negligence Defined

This case grows out of the alleged negligence on the part of the defendants, and the defendants among other things alleges that [fol. 410] plaintiff's intestate was also guilty of negligence which was the sole or proximate cause of his injury and death, which if true would bar any recovery.

Negligence as applied to either the person injured or to the defendant in a case like this, means the failure to exercise ordinary care, that is, such care as ordinarily prudent persons would exercise under circumstances similar to those shown by the evidence in this case.

The plaintiff, Mrs. Mary Kennedy, administratrix of D. C. Kennedy, deceased, bases her right of action upon a certain Act of Congress, the same being "An act relating to the liability of common carriers by railroad to their employees in certain cases." The said act provide*n* as follows: "That every common carrier by railroad while engaged in commerce between the several states or territories, etc., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason [fol. 411] of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves or other equipment."

Section #3 of the Act further provides; that in *a* all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Now, gentlemen of the jury, if you should find from a preponderance of all the evidence in the case that on July 9th, 1918, the deceased, David Kennedy, was in the employ of the N. C. & St. L. Ry. Co., Walker D. Hines, Director General of Railroads, John Barton Payne, Agent, etc., as a railroad engineer, that on said day, about 7 o'clock A. M. he was in his proper place in the performance of his duties, operating an engine on train No. 4 of defendants' line of road from Nashville, and that said train was engaged in commerce between points in Tennessee and Kentucky, that on said day he was killed while thus engaged, his train colliding with another train running in an opposite direction, the plaintiff as administratrix [fol. 412] of his estate would have the right to recover a verdict at your hands, provided you should find from a preponderance of all the evidence in the case that the collision of trains in which her said intestate lost his life was the result of the negligence in whole or in part, of the fireman in failing to look and observe approaching train No. 1 and to notify deceased that said train, a superior train, had not passed, or that it was in whole or in part the result of or caused by the conductor's negligence in not watching for train No. 1 and in not warning deceased to stop at Shops to let said train pass, or that it was, in whole or in part caused by the negligence of the operator at Shops in allowing train No. 4 to pass on the main track at Shops when train No. 1 has not passed that point. Or that it was in whole or in — caused by the negligence of the flagman in failing to assist the conductor by watching for the passing of train No. 1, and in failing to warn the conductor that No. 1 had not passed so as to enable the conductor to stop train No. 4, at shops and let No. 1 pass at said point or that said collision causing the death of her intestate was, in whole or in part, caused by the negligence of said flagman in not watching the rear end of train No. 4, thereby protecting same, and in not being at or near the said rear end after passing shops, and in [fol. 413] failing thereby to hear the signal given by the operator at shops, or that said collision was due in whole or in part, to the negligence of the defendants, in employing an inexperienced flagman on train No. 4, on July 9th, 1918, and that because of his inexperience and inability to understand his duties he failed to assist the conductor by watching for train No. 1, and in not notifying said conductor that train No. 1, had not passed so that he could have the train stopped before coming in contact with train No. 1.

Before the plaintiff can recover it must be shown by a preponderance of all the evidence that some one, or all, of the above acts of alleged negligence was in whole or in part, the cause of the injury and death of plaintiff's intestate, David Kennedy.

If you should find from the evidence that said collision of trains and consequent injury and death of her said intestate was not the result in whole or in part, of anyone, or all of said acts, of alleged negligence specially mentioned if shown to be acts of negligence, but was the result of unknown causes, or to the alleged negligent act of the deceased, D. C. Kennedy, when the plaintiff has failed to make out such a case of liability as would warrant a recovery.

I charge you furthermore, that if you should find that said col-
[fol. 414] lision of trains No. 1 and No. 4, on July 9th, 1918, and consequent injury and death of plaintiff's intestate, D. C. Kennedy was not due to the negligence of defendant or other employees on No. 4, as alleged but was proximately due to his own negligence in not watching for train No. 1, and that he passed shops negligently knowing that No. 1 had not arrvied at that point, then the plaintiff could not recover in this case and you should find for the defendants. And furthermore, if it is not disproved by a preponderance of all the evidence that said collision of trains 1 and 4, and consequent death of D. C. Kennedy, was not proximately caused by his own carelessness and negligence, as aforesaid, then it would be your duty to return a verdict in favor of the defendants.

If you should find from a preponderance of all the evidence in the case that the collision of said trains and consequent injury and death of D. C. Kennedy, resulted, in whole or in part, from an act of negligence either on the part of the conductor or flagman on train No. 4, or from defendants' employment of said flagman, as above specifically set forth, and should further find that deceased, David Kennedy, was guilty of negligence as above specifically set forth, the-, while you should find for the plaintiff yet it would be your duty to diminish the damages in proportion to the amount of negligence attributable to the said David Kennedy.

[fol. 415] If you should find for the defendants your verdict should be "We find for the defendants".

But if you should find for the plaintiff you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have diminished by reason of advancing years. The Jury may further consider the care, attention, advice and instruction which the evidence shows, if such be the case that deceased reasonably might have been expected to give his minor children and make such pecuniary allowance therefor as in your opinion is warranted by the evidence. In no event should your verdict exceed the amount sued for in the declaration.

Gentlemen of the jury, I am requested by the defendants to charge you as follows:

I charge you that the burden of proof is upon the defendants to show that the deceased was guilty of contributory negligence in order to diminish the recovery, but that if the weight or preponderance of the evidence, whether coming from plaintiff's or defendants' witnesses, shows the deceased to have been guilty of such contributory negligence, the defendants have thus carried the burden of proof."

The Court inserted the words in the instruction "in order to di-
[fol. 416] minish recovery" so that it reads and I will read it again with the words added by the Court:

"I charge you that the burden of proof is upon the defendants to show that the deceased was guilty of contributory negligence in order to diminish recovery (these words being added by the Court

and not in the special request) but if the weight or preponderance of the evidence, whether coming from plaintiff's or defendants' witness, shows the deceased to have been guilty of such contributory negligence the defendants have thus carried the burden of proof."

Request No. 4

"The term, 'negligence' has been defined and means the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done."

Request No. 6

I charge you that an injury which is the natural and probable result of an act of negligence is actionable and such act is a proximate cause of the injury. But an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable and such an act is either a remote [fol. 417] cause or no cause whatever of the injury."

The only change the Court made in that request was changing the word "The" to "a" in the third line.

Request No. 7

"If you find from the evidence that a custom existed between engineer Kennedy and conductor Eubanks whereby the latter relied upon the former to lookout for and identify train No. 1, and that Kennedy understood or believed that Eubanks, was so relying upon him the morning he was killed, then I charge you the plaintiff can not recover for any alleged negligence in this regard upon the part of Eubanks as an employe of the defendants."

The Court adds this addition: "But if you find that in the past there had simply been a specific agreement that Kennedy should not expect Eubanks to lookout for No. 1, on those particular days, and that there was no uniform custom or agreement as to all times, or on this morning, July 9th, 1918, and that Kennedy did not believe, nor have cause to believe, that Eubanks, would not look out for No. 1, on this particular morning, then Kennedy did have the right to believe that Eubanks would look out for No. 1, on the morning of the accident."

Request No. 8

If you find from the evidence that conductor James P. Eubanks was guilty of a violation of the Railroad Company's rule No. 83, or any other rule shown in evidence in this case, then I charge you that [fol. 418] the mere fact that Eubanks did so violate such rule or rules is not in and of itself negligence on the part of the defendants."

The Court has added the following: "This is correct. Before the plaintiff can recover on the ground that the conductor J. P. Eubanks,

violated the R. R. Co. Rule No. 83, or any other rule, it must be made to appear that such violation in whole or in part cause the accident and consequent injury and death of deceased."

Request No. 22

"I charge you that if you should find and believe from the evidence in this case that certain rules of the company were violated by defendants, that this may be looked to by you in determining the question whether defendants were guilty of negligence in whole or in part which was the proximate cause of decedent'- death, but the mere fact that a rule was violated by defendants would not of and in itself entitle plaintiff to recover, unless such violation in your judgment amounted to negligence which in whole or in part was the proximate cause of decedent'- death."

You will consider all these special requests as the Court has read them to you, along with the general charge, with such modifications as the Court has indicated.

Take the case.

A. B. Neil, Judge.

[fol. 419] After the general charge of the Court had been delivered to the jury and before the jury retired to consider of their verdict, the defendants requested the Court to charge the jury as follows:

In Circuit Court of Davidson County

Defendants' Requested Charges

Request No. 1

"I charge that before you can find the defendants liable for any amount, that the plaintiff must show by a preponderance of the evidence that the defendants were guilty of some act of negligence alleged in the declaration which, in whole or in part, was "the proximate cause of her intestate's death."

(Refused because substantially covered in the general charge. A. B. Neil, Judge.)

This does not state with exactness what was in the Court's mind. I thought that the principle or basis of liability had been sufficiently covered in the general charge the Court adopting the language of the Statute and exclusive of the words "proximate" cause of intestate's death" as called for in the request.

A. B. Neil, Judge.

Request No. 2

"If you find from the evidence that the defendants were guilty of some act of negligence alleged in the declaration, but that such act was not "the" proximate cause of plaintiff's intestate's death, I

[fol. 420] charge you that plaintiff cannot recover and your verdict must be for the defendants."

(Refused because substantially covered in the general charge. A. B. Neil, Judge.)

Request No. 5

"I charge you that if you find from the evidence that defendants' agents were guilty of some act of negligence, alleged in the declaration, which in whole or in part was the proximate cause of plaintiff's intestate's death, then and in that event defendants would be liable to the plaintiff for some amount, but I further charge you that the undisputed proof shows deceased to have been guilty of contributory negligence, so that if you find the defendants liable, under the instructions hereinbefore given, you must reduce the amount which plaintiff might be entitled to in the absence of contributory negligence on the part of the deceased in proportion to such contributory negligence as the proof, in your judgment, shows him to have been guilty of."

(Refused. A. B. Neil, Judge.)

Request No. 9

"If you find from the evidence that plaintiff's intestate, D. C. Kennedy, for whose death this suit is brought, could, by the exercise [fol. 421] of ordinary care, have prevented the accident, which resulted in his death, then I charge you that the plaintiff in this case cannot recover and your verdict must be for the defendants."

(Refused. A. B. Neil, Judge.)

Request No. 10

"If you find from the evidence that conductor Eubank was negligent in failing to signal engineer Kennedy to stop the train after it had passed on to the single track and you further find that engineer Kennedy had no reason to believe that conductor Eubanks would so signal him either because Eubanks had told him he would not or because it was not the custom of the conductor to watch for the passage of train No. 1, and engineer Kennedy knew it was not, then I charge you that engineer Kennedy assumed the risk of such failure on the part of conductor Eubanks to so signal and on this branch of the case you will find in favor of defendant railway."

(Refused. A. B. Neil, Judge.)

Request No. 11

"The employee assumes the risk of such negligence of his fellow employee as is shown to him or as custom has shown to him to be the habit of the fellow employee. If you find from the evidence that it

was a custom known to Kennedy that his conductor would be taking [fol. 422] tickets while he was passing from the Union Station to the New Shops and would not be looking out for the passage of No. 1, then he assumed the risk of conductor Eubanks failure to do so and he cannot recover on account of such negligence."

(Refused. A. B. Neil, Judge.)

Request No. 12

"Certain rules promulgated by the railway have been introduced in this case to the effect that it was the duty of conductor Eubanks to keep a lookout for No. 1, between the Union Station and the New Shops. The Court charges you that such rules were not made for the protection of — engineers as Kennedy, in this, and no right can accrue to such engineer by reason of the failure of the conductor to observe them. It was the duty of engineer Kennedy to observe said rules and if he failed to do so and such failure caused the accident in which he lost his life, the fact that the engineer failed to prevent the accident does not entitle plaintiff to recover in this case."

(Refused. A. B. Neil, Judge.)

Request No. 13

"It is insisted by the plaintiff that the failure of conductor Eubanks to stop the train for the passage of No. 1, was negligence en- [fol. 423] titling plaintiff to recover, but I charge you, gentlemen of the jury, that no such duty devolved upon him as to engineer Kennedy, until he became actually aware that the train had not passed No. 1, and that Kennedy was not going to stop, and if you find that conductor Eubanks did not actually know that this train had not passed No. 1, the plaintiff cannot recover on account of such failure of conductor Eubanks".

(Refused. A. B. Neil, Judge.)

Request No. 14

"The Court charges you that the degree of care to be observed in the running of trains is not to be determined by the rules of the railway and you cannot determine in this case the duty of the fellow servants of engineer Kennedy by what is contained in the rules presented in this cause. The question presented for your consideration is whether from the facts in this case Mr. Kennedy came to his death by reason of his own fault of negligence. If you find that Mr. Kennedy solely by reason of his own fault came to his death in this accident, then he cannot recover. The only manner in which you must consider the rules is as to whether engineer Kennedy had a right under such rules to rely upon conductor Eubanks stopping the train in case he failed to do so.

If you find that Kennedy knew that Eubanks would be engaged in taking up tickets or for other reasons might not observe the pas-[fol. 424] sage of No. 1, then the defendant would not be liable for the failure of Eubanks to see the passage of No. 1, and signal Kennedy to stop."

(Refused. A. B. Neil, Judge.)

Request No. 15

"Gentlemen of the jury, the Court charges you that under the law and admitted facts in this case, the paramount duty of looking out for No. 1, was on the engineer and if you find that the order was delivered to him by the conductor and an understanding was had between them in substance and effect that the conductor would be busy taking tickets and not look out for No. 1, but would expect the engineeer to keep the lookout then I charge you that the engineer assumed the duty of keeping a lookout, and if you find that he failed to do so, then you will find for defendant."

(Refused. Substantially covered in special request No. 7. A. B. Neil, Judge.)

Request No. 16

"If you find that the other members of the crew had other duties to perform during running of the train between the Union Station and the shops, which might prevent them from observing the passing of No. 1, and you find from the evidence that the engineer knew [fol. 425] this, then plaintiff cannot recover and your verdict should be for the defendants."

(Refused. A. B. Neil, Judge.)

Request No. 17.

If you believe from the evidence that the plaintiff intestate D. C. Kennedy was negligent in the handling and operation of train No. 4, of which he was the engineer, and if you further believe from the evidence that such negligence continued up to the time of the accident and that the accident would not have occurred if he had not been so negligent, then I charge you that the plaintiff cannot recover, and your verdict must be for the defendant, even though you find from the evidence that the conductor of the train Jas. P. Eubanks was also guilty of Negligence."

(Refused. A. B. Neil, Judge.)

Request No. 18

"If you believe from the evidence that the accident resulting in D. C. Kennedy's death would not have occurred unless both Eubanks the conductor and Kennedy the engineer, were continuously

negligent up to the time of the accident, there can be no recovery in this case, and your verdict must be for the defendant."

[fol. 426] (Refused. A. B. Neil, Judge.)

Request No. 19

"If you believe from the evidence that D. C. Kennedy, for whose death this suit is brought, deliberately and understandingly undertook to assume Eubanks" duty to watch out for train No. 1, between the Union Station at Nashville and the shops, as provided by rule 83, then I charge you that the plaintiff in this case is estopped to rely as a basis for recovery upon the fact that Eubanks did so violate said rule."

(Refused. Covered by request No. 7. A. B. Neil, Judge.)

Request No. 20

"If you believe from the evidence that the engineer D. C. Kennedy deliberately and understandingly agreed with conductor Eubanks that said conductor need not comply with said rule of the railroad, No. 83, as applicable to the movement between the Union Station at Nashville and the shops at Nashville, then I charge you that if you find from the evidence that conductor Eubanks did violate said rule, yet the plaintiff on account of said agreement, cannot rely thereon as a basis for recovery in this case.

(Refused. A. B. Neil, Judge.)

[fol. 427] Request No. 21

"If you find from the evidence that engineer D. C. Kennedy knew that conductor Eubanks on the date in question did not intend to find out by his own act whether train No. 4 passed train No. 1, between the Union Station at Nashville and the shops at Nashville, and if you further find that said engineer Kennedy, with said knowledge, made no complaint nor protest, then I charge you that the plaintiff cannot rely as a basis for recovery upon the fact, if you find from the evidence that it is a fact, that Eubanks did not intend to and did not watch out for said train No. 1, as aforesaid."

(Refused. A. B. Neil, Judge.)

In Circuit Court of Davidson County

Order Settling Bill of Exceptions, etc.

The Court declined to give said special requests as shown by the signature and remarks thereon, to which action defendant excepted. The defendant reasonably moved the Court for a new trial, after the

jury had returned a verdict for $8,000.00 which is shown by the minutes of the Court, which was overruled, to which action defendants excepted.

The Court orders the Clerk to send in their original form, after they are marked filed to the Court of Civil Appeals, Exhibits Numbers one, two, three, four, five, six and seven to the testimony of J. P. Eubanks, and Exhibits one, two, and three to the testimony [fol. 428] of W. G. Jones, which are identified by the signature of the Court and made a part of the record in this cause.

The Clerk is further ordered to copy into this record at page 3, at the place called for therein Exhibit 1, to the testimony of Mrs. Mary Kennedy, and at page 101 at the place called for therein Exhibit 5 to the testimony of J. P. Eubanks, and at pages 125 and 126 Exhibits 1 and 2 respectively at the places called for therein to the testimony of C. B. Glenn, all of which exhibits are present and identified by the signature of the Court at the time this bill of exceptions is signed.

The defendants tender this their bill of exceptions, to the action of the Court in overruling their motion for a new trial and to all motions contained herein, which includes all the evidence and proceedings had in the trial of this cause, except those matters constituting the technical record which is signed and sealed by the Court, ordered to be filed and made a part of the record in this cause.

This December 11th, 1923.

A. B. Neil, Judge.

In Circuit Court of Davidson County

Agreement as to Exhibits

It is agreed that the exhibits that have been identified by the signature of the trial judge may be sent up to the Appellate Court in their original form.

O. K. W. E. Norvell, Atty. for Plaintiff. Seth Walker, Atty. for Defendants.

[fols. 429-431] In Circuit Court of Davidson County

Appeal Bond—Filed 7th Day of December, 1920

[For $250.00; omitted in printing]

[fol. 432] IN CIRCUIT COURT OF DAVIDSON COUNTY

CLERK'S CERTIFICATE

STATE OF TENNESSEE:

I, W. B. Cook, Clerk of the Circuit Court for the County of Davidson, in the state aforesaid, do certify that the foregoing is a correct transcript of the record and proceedings had in said Court, in the case heretofore prosecuted and determined therein, between Mary V. Kennedy Admrx. of Estate of D. C. Kennedy Plaintiff, and Nashville, Chattanooga & St. Louis Railway et al. Defendant, as the same remain of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at office, in Nashville, the 24 day of May in the year one thousand nine hundred and twenty-one and in the 145 year of American Independence.

W. B. Cook, Clerk.

[fol. 433] [File endorsement omitted]

IN COURT OF CIVIL APPEALS

ASSIGNMENTS OF ERROR—Filed April 18, 1922

I

The Court erred in overruling the defendants' second, third and fourth grounds of their motion for a new trial, which were as follows:

"2. Because there is no evidence to support the verdict of the jury.

"3. Because the court erred in overruling defendants' motion for peremptory instructions at the close of all the evidence, which motion is as follows:

" 'The defendants, John Barton Payne, Federal Agent, and the Nashville, Chattanooga & St. Louis Railway, move the Court to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced (no verdict) in favor of the plaintiff is justified.'

" '* * * The defendants move the Court to peremptorily instruct the jury to return a verdict in favor of both defendants on the ground that the evidence shows without a dispute that the primary and proximate and only negligence shown in the proof is that of the deceased.'

"4. Because the Court erred in overruling the motion for peremptory instructions made on behalf of the Nashville, Chattanooga [fol. 434] & St. Louis Railway, for the reason that the undisputed proof shows the death of the deceased, D. C. Kennedy, and the acci-

dent which brought his death, for which this suit was brought, occurred at a time when the Nashville, Chattanooga & St. Louis Railway was not operating the trains and cars that caused the deceased's death, but the proof shows that said train was being operated by the United States Government, and therefore, under the Cummins-Esch Bill, no recovery could be had against said Railway." (R. p. 9-10.)

II

The Court erred in overruling the defendants' fifth and sixth grounds of their motion for a new trial, which were as follows:

"5. Because the verdict of the jury, under the law and the facts of the case, is excessive."

"6. Because the verdict, under the law and facts, is so excessive as to show prejudice, passion and caprice on the part of the jury." (R. p. 10.)

[fol. 435] III

The Court erred in overruling the defendants' thirteenth ground of their motion for a new trial, which was as follows:

"13. Because the Court erred in charging the jury as follows:

" 'Now, gentlemen of the jury, if you should find from a preponderance of all the evidence in the case that on July 9th, 1918, the deceased, David Kennedy, was in the employ of the N., C. & St. L. Ry., Walker D. Hines, Director-General of Railroads, Jno. Barton Payne, agent, etc., as a railroad engineer, that on said date about 7 o'clock, A. M., he was in the proper place in the performance of his duties, operating an engine on Train Number Four of defendants' line of road from Nashville, and that said train was engaged in commerce between points in Tennessee and Kentucky, that on said day he was killed while thus engaged, his train colliding with another train running in opposite direction, the plaintiff, as administratrix of his estate, would have the right to recover a verdict at your hands provided you should find from a preponderance of all the evidence in the case that the collision of trains in which her said intestate lost his life was the result of the negligence in whole or in part of the fireman in failing to look and observe approaching train [fol. 436] No. 1, and to notify deceased that said train, a superior train, had not passed or that it was, in whole or in part, the result of or caused by the conductor's negligence in not watching for train No. 1, and in not warning deceased to stop at Shops to let said train pass or that it was in whole or in part caused by the negligence of the operator at Shops in allowing train No. 4 to pass onto the main track at Shops when train No. 1 had not passed that point, or that it was in whole or in part caused by the negligence of the flagman in failing to assist the conductor by watching for the passing train, No. 1, and in failing to warn the conductor that No. 1 had not passed so as to enable the conductor to stop train No. 4 at Shops and let No.

1 pass at said point or that said collision causing the death of her intestate was in whole or in part caused by the negligence of said flagman in not watching the rear end of train No. 4, thereby protecting same, and in not being at or near the said rear end after passing Shops, and in failing thereby to hear the signal given by the operator at Shops, or that said collision was due in whole or in part to the negligence of the defendants in employing an inexperienced flagman on train No. 4, on July 9th, 1918, and that because of his inexperience and inability to understand his duties he failed [fol. 437] to assist the conductor by watching for train No. 1, and in not notifying said conductor that train No. 1 had not passed, so that he could have the train stopped before coming in contact with train No. 1.

" 'The Court committed error in charging the jury that if they should find from the evidence that the deceased lost his life because of the negligence in whole or in part of the fireman in failing to look out and observe approaching train No. 1, and in failing to notify deceased that said superior train had not passed for the reason that there was no evidence upon which to submit this question to the jury, and because that portion of the excerpt set out in this ground for a new trial fails to mention the fact that said negligence must have been the approximate cause in whole or in part of deceased's death.

" 'The Court committed error further in charging the jury that if they found from the evidence that the deceased's death was caused in whole or in part, by the negligence of the operator at the shops in allowing train No. 4 to pass on to the main track at Shops when train No. 1 had not passed that point, for the reason that there was no proof offered upon which the question of negligence of the operator could properly be submitted to the jury and because that part of said instruction fails to tell the jury that in the event the operator was [fol. 438] guilty of negligence, before recovery could be had, such negligence must have been the proximate cause of deceased's death." ' (R. pp. 16-19.)

IV

The Court erred in overruling the defendants' fifteenth ground of their motion for a new trial, which was as follows:

"15. Because the Court erred in charging the jury as follows:

" 'But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason of advancing years. The jury may further consider the care, attention, advice, and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children and make such pecuniary allowance therefor as in your opinion is warranted by the evidence.' " (R. p. 19.)

The jury were nowhere limited to "compensation," the limit of recovery in such a case.

[fol. 439] V

The Court erred in overruling the defendants' nin-teenth and twentieth grounds of their motion for a new trial, which were as follows:

"19. Because the Court erred in failing and refusing to give defendants' request No. 1, which is in the following words and figures, to-wit:

" 'I charge that before you can find the defendants liable for any amount that the plaintiff must show by a preponderance of the evidence that the defendants were guilty of some act of negligence alleged in the declaration which in whole or in part was the proximate cause of her intestate's death.'

"20. Because the Court erred in failing and refusing to charge the jury defendants' request No. 2, which is in the following words and figures, to wit:

" 'If you find from the evidence that the defendants were guilty of some act of negligence alleged in the declaration, but that such act was not the proximate cause of plaintiff's intestate's death, I charge you that plaintiff can not recover and your verdict must be for the defendants.' " (R., pp. 20-21.)

[fol. 440] [File endorsement omitted.]

IN COURT OF CIVIL APPEALS

[Title omitted]

OPINION—Filed Feb. 23, 1923

This is an action for damages in behalf of defendant in error, the widow of David Kennedy, deceased, against the plaintiff in error, The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Federal Agent, for the death of her husband who lost his life in a collision between two trains on the defendant's road on one of which the deceased was the engineer.

The declaration, as originally drawn, contained three counts, but by leave of the court was amended by the filing of some additional counts, making in all five counts, the substantial parts of which may be thus stated:

First Count

After certain formal statements, it is averred;

"The plaintiff sues for $25,000.00 as damages and for cause of action states;

"That on or about the 9th. day of July, 1918, the said D. C. Kennedy was in the employ of the defendants, acting in the capacity of engineer on a passenger train, engaged in interstate commerce, routed through Nashville, Shops and Harding, stations in Davidson County, Tennessee, to points north and west of Nashville.

"On the morning of said day, plaintiff's intestate assumed his usual duties at Nashville, Shops and Harding. He was in his proper place, in the cab on the right hand side of the engine, discharging his duties. At a point between Harding and Shops in Davidson County, Tennessee, a collision occurred between the train occupied by plaintiff's intestate and No. 1, a train proceeding in an opposite direction with Nashville as its destination. That said collision was not due to any negligence or carelessness on part of plaintiff's intestate but was due to the negligence and carelessness of other em- [fol. 441] ployes of defendants, especially that of the fireman of the engine driven by intestate. Plaintiff's intestate's train was required to wait at Shops and give No. 1, the right of way if it had not already passed No. 1, but before intestate reached Shops a blind train passed intestate's train on the left and intestate supposed that it was said superior train. Said train passed on the side of the fireman who was riding with intestate but said fireman did not notify, as he should have done, intestate that it was another train. Plaintiff's intestate was in his proper place, in the right hand cab, and could not see the approaching train which collided with intestate's train because of a long and dangerous curve on which the accident occurred; said curve extended to the left of intestate. It was the custom and duty of the fireman to be on the lookout when the engineman could not see on opposite track and observe and report the passing of superior trains and the negligence and carelessness of intestate's fireman, an employe of defendants, in not looking ahead and warning intestate that No. 1 had not passed, caused the accident and intestate was killed and suffered great physical pain and mental anguish before he died, in all of which plaintiff's intestate was free from fault or negligence and his said death was due to the negligent acts and omissions of defendants as above set forth" (R. pp. 28-30).

Second Count

The pertinent and different portion of this count is as follows:

"The management and control of intestate's train was vested in the conductor, an employe of defendants, of said train equally as much, if not more, than it was in intestate. In fact, it was the custom of intestate, as well as engineers acting in a similar capacity, to rely on signals from said conductor when to stop and start said

train. Intestate and the conductor were required to wait at Shops and give No. 1 the right of way but before intestate reached Shops a train passed intestate's train on the left and as intestate did not receive any signal from the conductor to stop at Shops, intestate supposed it was the train that he was supposed to let pass at or before [fol. 442] Shops that had passed him. The said conductor negligently failed to observe that said passing train was not No. 1, and carelessly and negligently failed to give a stopping signal and allowed intestate to proceed. That by reason of said negligence and carelessness on the part of said conductor, and without fault on the part of intestate, the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died" (R., p. 31).

Third Count

The basis of this count is as follows:

"That said collision was not due to any negligence on the part of plaintiff's intestate but was due to the negligence and carelessness of other employes of defendants, particularly the operator at Shops who had charge of signaling trains at that point and who failed to signal intestate's train to stop. Plaintiff's intestate was on the right hand side of the engine and another train or 'blind' had passed intestate's train on the left, intestate thinking that it was the train — Shops. The operator negligently and carelessly failed to give intestate the stop signal at Shops but on the contrary allowed intestate to proceed and threw the switch or allowed it to remain open" (R., p. 32).

Fourth Count

The basis of this count is as follows:

"That the flagman knew, or could have known, that No. 4 should not have gone on to the si*gn*le tra-k beyond the Shops until it was definitely ascertained that No. 1 had passed. That the said flagman had been furnished by the conductor with his copy of the train order giving the number of the engine pulling No. 1. That it was the flagman's duty to read train orders, keep them in mind and to remind the conductor, should there be occasion to do so, and there was particularly such an occasion on the morning in question when the conductor was busy in a crowded coach, as the flagman well knew. That in utter disregard of his duty, the flagman on No. 4, knowing, or having cause to know, that No. 1 had not passed, failed to remind the conductor of that fact and by reason of said negligence and carelessness on the part of said flagman, the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died.

[fol. 443] "It was also the duty of the flagman to be on and protect the rear of the train. As No. 4 passed the Shops Tower the operator then endeavored to signal and stop No. 4, the flagman was

not on the rear of the train. Had he been there in his place of duty, the train could have been stopped by the flagman's observing said signal and because of this negligence of the flagman the accident was not averted, but did occur and intestate was killed because thereof, etc." (R. p-. 32-34).

Fifth Count

The vital part of this count is as follows:

"That the defendants were negligent under the circumstances in putting on said train a flagman who had no prior experience on said road with passenger trains and who was making his first run on this train and in not having furnished to said flagman a more specific order as to No. 1. That said flagman, not fully understanding his duties on account of the negligence of defendants, failed to carefully look out for the passage of No. 1 before No. 4 reached the Shops and failed to remind the conductor who was busily engaged in taking up tickets of that fact so that the said conductor did not pull down or angle-cock the train and it was by reason of the negligence of the defendants as aforesaid that the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died."

To this declaration the defendants interposed pleas of not guilty. The case thus at issue was heard before the court and a jury, when, upon completion of the evidence, defendants moved the court for peremptory instructions in their favor, which motion was overruled by the court. Thereupon and after argument of counsel and charge of the court, the jury retired, and, after consideration, returned into court their verdict in favor of defendants in error against plaintiff in error, John Barton Payne, Federal Agent, for $8,000.00, and the court pronounced judgment accordingly.

There was motion for new trial by defendants below, plaintiffs in error, based upon 35 grounds which need not be recited as much thereof as are relied upon in this court are covered by the assignments of error. This motion was by the court overruled and judg- [fol. 444] ment pronounced as stated, from which an appeal was prayed, granted and has been perfected to this court, wherein the following error- are assigned;

1. The court erred in overruling the defendants' second, third and fourth grounds of their motion for a new trial, which were as follows;

"Two. Because there is no evidence to support the verdict of the jury.

"Three. Because the court erred in overruling defendants' motion for peremptory instructions at the close of all the evidence, which motion was as follows;

" 'The defendants, John Barton Payne, Federal Agent, and the Nashville, Chattanooga & St. Louis Railway, move the court to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced (no verdict) in favor of the plaintiff is justified.'

" ' * * * The defendants move the Court to peremptorily instruct the jury to return a verdict in favor of both defendants on the ground that the evidence shows without a dispute that the primary and proximate and only negligence shown in the proof is that of the deceased.'

"Four. Because the Court erred in overruling the motion for peremptory instructions made on behalf of the Nashville, Chattanooga & St. Louis Railway, for the reason that the undisputed proof shows the death of the deceased, D. C. Kennedy, and the accident which brought his death, for which this suit was brought, occurred at a time when the Nashville, Chattanooga & St. Louis Railway was not operating the trains and cars that caused the deceased's death, but the proof shows that said train was being operated by the United States Government, and therefore, under the Cummins-Esch Bill, no recovery could be had against said Railway" (R. p-. 9-10).

2. The Court erred in overruling the defendants' fifth and sixth grounds of their motion for a new trial, which were as follows:

"Five. Because the verdict of the jury, under the law and facts, is so excessive as to show prejudice, passion and caprice on the part of the jury" (R. p. 10).

[fol. 445] 3. The court erred in overruling the defendant's thirteenth ground of their motion for a new trial, which was as follows:

'13. Because the Court erred in charging the jury as follows:

" 'Now, gentlemen of the jury, if you should find from a preponderance of all the evidence in the case that on July 9th, 1918, the deceased, David Kennedy, was in the employ of the N. C. & St. L. Rwy. Walker D. Hines, Director General of Railroads, Jno. Barton Payne, Agent, etc., as a railroad engineer, that on said date about 7 o'clock a. m. he was in the proper place in the performance of his duties, operating an engine on train No. four of defendants' line of road from Nashville, and that said train was engaged in commerce between points in Tennessee and Kentucky, that on said day he was killed while thus engaged, his train colliding with another train running in opposite direction, the plaintiff, as adminitratrix of his estate, would have the right to recover a verdict at your hands provided you should find from a preponderance of all the evidence in the case that the collision of trains in which her said intestate lost his life was the result of the negligence in whole or in part of the fireman in failing to look and observe approaching train No. 1, and to notify deceased that said train, a superior train, had not passed or that it was, in whole or in part, the result of or caused by the conductor's negligence in not watching for train No. 1, and in not warn-

ing deceased to stop at Shops to let said train pass or that it was in whole or in part caused by the negligence of the operator at Shops when train No. 1 had not passed that point, or that it was in whole or in part caused by the negligence of the flagman in failing to assist the conductor by watching for the passing train, No. 1, and in failing to warn the conductor that No. 1 had not passed so as to enable the conductor to stop train No. 4 at Shops and let No. 1 pass at said point or that said collision causing the death of her intestate was in whole or in part caused by the negligence of said flagman in not watching the rear end of train No. 4, thereby protecting same, and in not being at or near the said rear end after passing Shops, and in failing thereby to hear the signal given by the operator at Shops, or that said collision was due in whole or in part to the negligence of [fol. 446] the defendants in employing an inexperienced flagman on train No. 4, on July 9th, 1918, and that because of his inexperience and inability to understand his duties he failed to assist the conductor by watching for train No. 1, and in not notifying said conductor that train No. 1 had not passed, so that he could have the train stopped before coming in contact with train No. 1.

" 'The Court committed error in charging the jury that if they found from the evidence that the deceased lost his life because of the negligence in whole or in part of the fireman in failing to look out and observe approaching train No. 1, and in failing to notify deceased that said superior train had not passed for the reason that there was no evidence upon which to submit this question to the jury, and because that portion of the excerpt set out in this ground for a new trial fails to mention the fact that said negligence must have been the approximate cuase in whole or in part of deceased's death.

" 'The Court committed error further in charging the jury that if they found from the evidence that the deceased's death was caused in whole or in part, by the negligence of the operator at the Shops in allowing train No. 4 to pass on to the main track at Shops when train No. 1 had not passed that point, for the reason that there was no proof offered upon which the question of negligence could properly be submitted to the jury and because that part of said instruction fails to tell the jury that in the event the operator was guilty of negligence, before recovery could be had, such negligence must have been the proximate cause of deceased's death.' " (R. pp. 16-19).

4. The Court erred in overruling the defendants' fifteenth ground of their motion for a new trial, which was as follows:

'1. Because the Court erred in charging the jury as follows:

5. " 'But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason of advancing years. The jury may further consider the care, attention, advice, and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to [fol. 447] give his minor children and make such pecuniary allow-

ance there for as in your opinion is warranted by the evidence.'" (R. p. 19).

The jury were nowhere limited to 'compensation', for the limit of recovery in such a case.

5. The Court erred in overruling the defendants' nineteenth and twentieth grounds of their motion for a new trial, which were as follows:

'19. Because the court erred in failing and refusing to give defendants' request No. 1, which is in the following words and figures, to-wit:

" 'I charge that before you can find the defendants liable for any amount that the plaintiff must show by a preponderance of the evidence that the defendants were guilty of some act of negligence alleged in the declaration which in whole or in part was the proximate cause of her intestate's death.'

"20. Because the Court erred in failing and refusing to charge the jury defendants' request No. 2, which is in the following words and figures, to-wit:

" 'If you find from the evidence that the defendants were guilty of some act of negligence alleged in the declaration, but that such act was not the proximate cause of plaintiff's intestate's death, I charge you that plaintiff cannot recover and your verdict must be for the defendants.' ". (R. pp. 20-21).

6. The Court erred in overruling the defendants' twenty-first ground of their motion for a new trial, which was as follows:

'21. Because the Court erred in failing and refusing to charge the jury defendants' request No. 5, which is in the following words and figures, to-wit:

" 'I charge you that if you find from the evidence that defendants' agents were guilty of some act of negligence alleged in the declaration, which, in whole or in part, was the proximate cause of plaintiff's intestate's death, then and in that event defendants would be liable to the plaintiff for some amount, but I further charge you that the undisputed proof shows deceased to have been guilty of contributory negligence, so that if you find the defendants liable, under the instructions hereinbefore given you must reduce the amount [fol. 448] which plaintiff might be entitled to in the absence of contributory negligence on the part of the deceased in proportion to such contributory negligence as the proof, in your judgment, shows him to have been guilty of.' " (R. p. 21)".

In our treatment and disposition of the case we shall refer to parties in the relation sustained in the trial court, John Barton Payne, as defendant and Mrs. Mary Kennedy, Administratrix, as plaintiff, and we may state here as well as elsewhere that the Nashville, Chattanooga & St. Louis Railroad Company is no longer in the case or before the court, the suit having been dismissed as to it.

It appears that D. C. Kennedy, the deceased of whom the plaintiff, Mary Kennedy, is the widow and administratrix, was, at his death, seventy-two years of age. He was an experienced engineer, having served the N. C. & St. L. Railway since perhaps 1872. From the record evidence, he was an unusually active and vigorous man for his years. From his appearance he would perhaps have been taken for a much younger man than he was. He seems to have been regular in his service and attendance to his duties as an engineer of the N. C. & St. L. Railroad. He was earning and being paid at the time of his death $250.00 per month for his services as engineer which was largely utilized by him for the benefit and support of his family. He was engineer on train No. 4, leaving the Union Station at Nashville on the morning of the accident and resulting in his death July 9th, 1918. This train No. 4 collided with train No. 1 coming from an opposite direction some four or five miles out from the Union Station at Nashville and about one and one half miles from the shops of the road, the collision occurring about 7.30 a. m. on the date above stated.

As result of the collision and wreck, many were killed and injured, the death list including Kennedy, his fireman and train porter on train No. 4, which was a local passenger running north (or west) from Nashville, Tennessee, to Hickman, Kentucky, scheduled to leave the station at Nashville every morning regularly at 7.00 o'clock and carrying a combination baggage and mail car and perhaps five coaches.

Train No. 1 was a through passenger train running south (or east) from Hollow Rock Junction to Nashville, scheduled to leave Nashville at 7.10 a. m. It seems to have been composed of an engine, tender, mail and baggage car, day coach and several Pullman cars. [fol. 449] Train No. 1 is as to train No. 4 a superior train.

It appears that from the Union Station at Nashville to the operator's tower at the Shops there is a double track main line about two and one half miles in length, a portion of part thereof passing through the local yards at Nashville where there are many tracks, switch engines, etc. passing and at one point a little sharp but long curve. It also appears that here is a single line on past the point where the accident in question occurred about one and one-half miles beyond the shops; that between the Union Station and the shops trains 1 and 4 operate in a block system controlled and under the direction of the chief dispatcher and at the shops there is a tower at or in which an operator is stationed at all times.

At the time of the happening of the accident in question, Kennedy, the deceased, was the engineer, on train No. 4, one Meadows his fireman, one Eubanks the conductor, Sinclair the flagman and one Johnson was on duty as operator at the shops. Train No. 1 was due at the shops thirteen minutes later than or after 7.08 a. m., so that, when No. 1 and No. 4 were on time, they would pass on the double track at Nashville. It seems to have been the rule that, until a train reached the shops going from the Union Station at Nashville, it was controlled by the block system, but, past the shops they were controlled by superiority, time tables and train orders. The witness

Eubanks says that trains past the shops are governed by the train orders given them and the superiority of trains.

Mr. Templeton, superintendent, says that train No. 4, on the morning of July 9, 1918, was controlled in its movements from the Union Station to the shops by the block system extending up to just south and just north of the overhead bridge at Clifton Pike crossing, where she left the end of the block and she was controlled from there on through the system of interlocking switches by signals, and from there she was controlled by train orders and time tables.

Johnson, the shop operator of the defendant, says:

"Q. Now then, after they got past the shops they were controlled by superiority of trains and by time tables and train orders, that would be true?

A. That is going north they will.

Q. Like train No. 4?

A. Yes sir. No. 4 was. She was subject to the time table after [fol. 450] she has passed the shops."

On the morning of the accident out of which this case arises, train No. 4 seems to have been given this order:

"N. C. & St. L. Railway, Train Order No. 29, Nashville, July 9, 1918, To C. and E. No. 4 at Nashville. No. 4, engine 282, hold main track, meet No. 7, engine 215, at Harding, No. 1 has engine 281. E. V. P., Superintendent. Conductor and fireman must each have a copy of this order made E. M. this 7.00 a. m. Ogden Operator."

It appears in proof that there was a register at the shops where was kept a record of all trains and engines that passed. On the morning of the accident or collision, notwithstanding the fact that No. 1 had not passed, the operator at the shops showed a proceed signal for No. 4. There is some conflict as to what a proceed or clear signal at the shops meant. Johnson the operator, says that when the arm was up or the proceed signal it meant that "the route was right for the train to pass No. 4 if she had the right to go." While —— says "it simply notifies the engineer that the track is lined up if he has got the right to proceed." The defendant only quotes this evidence as to what this signal meant and on the question of the negligence of the operator.

It appears from the record that Eubank, who had been a conductor on the road for perhaps more than a quarter of a century and had run on this train for some three years prior to the accident in question, says that theretofore, when No. 1 was late and they would have to stop at the shops for other orders against No. 1, that the signal had not been clear or proceed but a stop signal, and, if this be true, it would seem to constitute some warrant for the jury's seeming finding that it was the practice and custom whenever No. 1 had not passed and orders had to be gotten at the shops as to where to meet that the shop's operator would display a stop signal; that, if the proceed signal was present, the engineer of No. 4 had the right to proceed under the assumption that either No. 1 was in or that they

would meet it further down the road at some siding and would receive orders against No. 1 at some station further down the road like Bellevue. The jury were therefore, in our view, within their [fol. 451] province in finding that the operator on this occasion was negligent in violating that custom and that such violation possibly, if not probably, misled Kennedy, the engineer. The operator denies any negligence and defendant says there is absolutely no proof of negligence on his part and no basis for asserting same.

On this point witness Eubanks says:

"Q. I will ask you whether or not, in those other instances when you had stopped at the shops, the signal arm there was *there* clear?

"A. I can't tell you that morning.

"Q. Sir?

"A. I can't tell you anything about it that morning.

"Q. I'm not asking you about that morning, I'm asking you about the other times when you stopped when the signal arm is up that is a clear track?

"A. Yes sir, supposed to be.

"Q. What does it mean when it is down?

"A. That is a stop signal.

"Q. I will ask you whether or not on a previous morning when No. 1 was late and your train had stopped at the tower and you and the engineer had gotten other orders against No. 1, if, in those instances, the stop signal hadn't been there?

"A. Yes sir, it was standing against us when I would go over after orders.

"Q. Of course, on this particular morning you were in your train and you couldn't see what the signal was and those other mornings you got out to get your orders and could see?

A. Whenever the train would come to a stop I would quit my work and go to see what the delay would be."

To the end of having a perhaps clearer apprehension of conditions, it may be helpful to set down some of the rules by which the movements of trains were guided and controlled.

"Train Number Four is a local passenger train running north (or west) from Nashville, Tennessee, to Hickman, Kentucky. It is scheduled to leave the Union Station at 7.00 a. m. every morning. It is composed of an engine, tender, combination baggage and mail car and five coaches.

Train Number One is a through or fast passenger train running south (or east) from Hollow Rock Junction to Nashville. It is scheduled to arrive at the Union Station at 7.10 a. m. It is composed of an engine, tender, mail and baggage car, day coach and several Pullman cars.

Southbound train Number One is superior to northbound train Number Four has the right of way over it.

[fol. 452] From the Union Station at Nashville to the N. C. & St. L. Shops, about two and one-half miles, is a double track main

line. Beyond the Shops there is for several miles a single line of main track.

Between the Union Station and the Shops, trains Number One and Four operate in a block system controlled and under the direction of the chief dispatcher.

Beyond the Shops said trains operate on schedules (time tables and superiority of trains) or train orders. Train orders do not apply within the limits of the block system but outside of said block system they control absolutely. Train orders are given only when the prearranged schedules or time tables cannot be literally followed as, for instance, when trains are late.

If Train Number One does not pass train Number Four before the latter (Number Four) arrives at the Shops it is the absolute, invariable duty (except where an express train order giving authority to proceed has been given) for the engineer to stop at the Shops so it can be ascertained what Number Four should do."

Defendant insists that "under Rule 105 the conductor has general charge of the train and all persons employed thereon. It is the general duty, also, of every employe to be on the alert to see that the train is operated in accordance with the rules and established practice."

Apparently, in argument, the insistence seems to be that, touching passengers, this duty is owed by all members of the train crew, but no such duty was owed to the engineer and fireman by the crew. Is this sound as a proposition of law? It has been said on this question:

"We are not disposed to take the narrow view that the rule in question was adopted solely for the protection of passengers or solely for the protection of employes who were not themselves negligent. It was intended for the protection of the train and everybody on it." L. & N. Railroad Company vs. Heinigs, Admx., 171 S. W. 852 (Ky.) and this view of the law impresses us as not only being the wisdom thereof but the righ-eousness as well. We fail to discover in the record where either the conductor of flagman gave any warning to the engineer or fireman or gave any stop signal or did practically anything toward ascertaining whether or not No. 1 had passed before No. 4 reached the shops. While we discover no direct proof [fol. 453] as to what took place on the engine, both the engineer and fireman having lost their lives, it seems but reasonable to assume, we think, that the fireman did not observe the rules and didn't stop the train nor warn the engineer to do so. We discover no distinctive evidence that either the conductor or flagman gave any warning to the engineer or pulled the train down, and, so far as the record discloses, they wholly failed to ascertain, as seems to have been their duty to do, whether or not No. 1 had passed before No. 4 reached the shops. We think it apparent under the record that on the morning of the accident it was the first time the flagman on No. 4 had ever made a trip as such on a passenger train; that he was inexperienced, having been employed some ten days perhaps or two weeks

before the accident, and had run on this division on freight trains only a very few times before being put upon a passenger train. It is apparent from the record that a conductor can stop a train when occupying a position toward the rear part thereby by either pulling the bell cord and thus notifying the engineer or he may stop it by angle cocking or pulling the emergency valve.

Having thus stated the controlling facts, as we interpret the record, we advert now to questions of law which, in our view of the facts, are controlling.

We think the first and third assignments may be disposed of together.

The defendant, John Barton Payne, Federal Agent, as has been stated, is alone before the court, the suit having been dismissed as to the N. C. & St. L. Railroad, so that we refer alone to the Federal Agent in what shall be said as to the defendants. We think under the facts that the collision in question and death of plaintiff's intestate resulted in whole or in part from the negligence of employes of the defendant other than plaintiff's intestate, and, that being true, the defendant is liable. Railroad Company vs. Skaggs, 240 U. S. 66; Federal Employers' Liability Act, 35 Statutes at Large, 65; 8 Federal Statute Anno., page 1208.

We have discovered no direct proof of what occurred in the cab of the engine, and that, of course, is material, both the engineer and fireman being killed, and, that being true, the jury, we think, were warranted in finding in accord with the natural presumption of the instinct of self-preservation that plaintiff's intestate was in the exer-[fol. 454] cise of ordinary care at the time of the accident. Railroad Company v. Herb, 134 Tenn. 397; Street Railway vs. Carroll, 141 Tenn. 265.

An engineer has other duties to discharge than keeping a vigilant lookout ahead and it follows that the question of his contributory negligence in failing to keep such vigilant lookout is one of fact for the jury. Central Railway & Banking Company v. Kent, 87 Ga. 402; L. & N. Railroad Co. v. Hutt, 101 Ala. 34; Hall v. Railway Co. 46 Minn. 439.

The proposition that if there be negligence of other employees or the carrier itself which fails to prevent or which contributes in whole or in part to the injury, the right of recovery exists without regard to how gross or proximate the negligence of the plaintiff's intestate may have been is passed upon in Railroad Company vs. Heinigs, Admrx., 271 S. W. 852; Penn. Co. v. Cole, 214 Federal 948; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42; Union Pacific Railroad Co. v. Hadley, Admr., 246 U. S., 330; Railroad Co. v. Neibel, 214 Federal 952.

It is only when plaintiff's negligence is the sole and only negligence producing or failing to prevent the injury that recovery is barred. Railroad Co. vs. Wiles, Admr., 240 U. S. 444; Union Pacific Railroad Co. v. Hadley, 246 U. S. 330; Penn. Co. v. Cole, 214 Federal 948.

Failure to prevent an injury where it can and should be done by the exercise of reasonable care and foresight constitutes an efficient

and proximate cause. Deming & Co. v. Merchants' Cotton-press, etc., Co., 90 Tenn. 306, 353; Postal Telegraph-Cable Co. v. Zopfi, 93 Tenn. 369; Railroad v. Kelly, 91 Tenn. 699; Anderson vs. Miller, 90 Tenn. 35; Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331.

Under the Federal Employers' Liability Act negligence of certain other employees as in other cases may be shown by either direct or circumstances evidence. Mulligan v. Atlantic Coast Line Railway Co., 104 S. C. 173.

After a verdict and judgment thereon in favor of plaintiff, the Supreme Court will take as true the strongest legitimate view of the evidence in favor of plaintiff and discard and disregard countervailing evidence. Machinery Co. v. Hargraves, 3 Cates, 474; Walton & Co. v. Burchel, Admr., 13 Cates 715.

[fol. 455] Save in cases where reasonable men may not differ as to the evidence and fair inferences to be drawn therefrom it lies within the exclusive province of the jury under proper instructions from the court to determine whether, upon the facts, plaintiff has been guilty of any contributory negligence and whether it is of such character as to defeat his action or simply go in mitigation of damages. Whirley v. Whiteman, 1 Head 610; Insurance Co. vs. Cross, 9 Heisk. 282; Memphis Street Railway v. Haynes, 102 Tenn. 712; Robertson & Hobbs v. Cayard, 111 Tenn. 356; Traction Co. v. Carroll, 113, Tenn. 514; Trac-ion Co. v. Brown, 115 Tenn. 323.

While, under the Federal Employers' Liability Act, negligence of co-employees may be an assumed risk, yet this is only so where the negligence was in fact known to the plaintiff or was so customary that he must be charged with knowledge thereof and plaintiff must appreciate the danger. Michigan Railway Co. v. Shoffer, 220 Federal 809, 813; Boldt v. Pennsylvania R. Co., 245 U. S. 441; Railway Co. v. Ward, 252 U. S. 18.

Under the facts as found and applicable law, the first and third assignments of error are overruled.

Touching the second assignment going to the question of the asserted excessiveness of the verdict;

As has already been shown, the facts, extent and effect of contributory negligence are questions for the jury under the facts proven and the court's charge. Proof in this case shows that plaintiff, for his years, was a very active man, in good physical condtion and with a rather large earning capacity of $250.00 per month, utilizing these earnings for the benefit of his wife and family, to whom he seemed devoted. The jury, we think, was vested with the right, and it was their duty, to take into consideration these and all other elements going to the question of the value of his life in determining the amount of the verdict. Railway Co. v. Holbrook, 235 U. S. 625. Whether the deceased was or was not guilty of causal negligence was a question for the jury, and were he guilty thereof, and other employees also, in such case, the diminution of damages can only be in proportion to plaintiff's negligence, if any, as compared with the com-

[fol. 456] bined negligence of himself and the other employees. Railroad v. Earnest, 229 U. S. 114.

Taking into consideration changing economic conditions, the cost of living, etc., which courts must and are properly doing, they are sustaining larger verdicts in personal injury cases than they did prior to the changes in conditions. Noyes v. Des Moines Club, 3 A. L. R. 605 and Note; Hurst v. Chicago, B. & Q. R. Co, 10 A. L. R. 174 and Note.

A case of purely excessive damages in an action, under the Federal Employers' Liability Act, is, under the federal rule, as we interpret it, a matter to be considered, dealt with and disposed of by the trial court. Southern R. Co., Carolina Division, v. Bennett, 233 U. S. 80.

Under the Tennessee rule the appellate courts will not generally, unless the allowance is so large as to indicate passion, prejudice, caprice or collusion upon the jury, disturb the verdict. Jenkins v. Hawkins, 98 Tenn. 545; Packet Co. v. Hobbs, 105 Tenn. 30; Lead Pencil Co. v. Davis, 108 Tenn. 251.

Touching the fourth assignment going to the question of the court's charge as to the elements to be considered by the jury in assessing damages, the error asserted being that the jury were nowhere limited to "compensation", the limit of recovery in such a case, as insisted.

The court charged the jury upon this question in these words:

"But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason of advancing years. The jury may further consider the care, attention, advice, and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children and make such pecuniary allowance therefor as in your opinion is warranted by the evidence."

In the case of Railroad v. Witherspoon, 112 Tenn. 128, the Supreme Court said:

"The ninth assignment of error is based upon the following part of the charge of the court: "If you find from the evidence that [fol. 457] the plaintiff did receive injury and damage as claimed, by the reckless and unnecessary fault of the defendant, as explained to you in these instructions, when you estimate from the proof the amount of damages she is entitled to recover, taking into consideration the character and extent of the injury and its probable consequences, the expense of medical attention occasioned by the alleged injury, also the mental pain and physical suffering undergone by her, and from these you will assess the amount of damages she is entitled to; and you will fix the amount of the damages according to these instructions, as you believe, from the evidence and the law, she is entitled to, and at a sum you think right and proper, from the facts of the case, not exceeding the amount claimed in the declaration. The learned trial judge here directs the jury that they must estimate from the proof the amount of damages that plaintiff is entitled to

recover. Again: 'You will assess the amount of damages she is entitled to;' and again, 'You will fix the amount according to these instructions, as you believe from the evidence and the law, she is entitled to, and at a sum you think right and proper, from the facts of the case, not exceeding the amount claimed in the declaration."

The real basis of damages in a case like this is compensation for the injury sustained, but the trial judge does not state this principle, but tells the jury more than once that they are to give the plaintiff what, in their opinion, — think right and proper in the case. He should have explained to the jury what was right and proper, and that what she was entitled to was compensation for the injuries she had sustained. The jury should have been told that they could give to the plaintiff compensation for her injuries, and not what the plaintiff was entitled to, nor what the jury might think right and proper. What the jury may think the plaintiff entitled to may not be what the law says she is entitled to, and what the jury may think right and proper is not necessarily what the law says is the real damage. The learned trial judge nowhere states that the amount or limit to which the plaintiff was entitled to recover was compensation for the injuries received, which is the proper measure of damages. It is true, he gives the elements upon which compensatory damages are based, and this, to a well-train- legal mind, might have [fol. 458] been sufficient to indicate that only compensation should be given; but the language used does not properly convey any idea of compensation, but, rather, an idea that the jury might give what they deemed plaintiff entitled to, and what they deemed right and proper from the facts of the case, not exceeding the amount alleged in the declaration, but without any other limit or guide.

We are of the opinion that there is error in the action of the trial judge upon the two features referred to, and they are material features in the case, and the cause must therefore be reversed and remanded for a new trial.

As in that, so in the instant case, the word "compensation" is not used in the charge. The holdings of the courts upon this question are in irreconcilable conflict but we think this court is relieved, if not precluded, from any extended discussion of this question in view of the latest holding by our Supreme Court in the above case, which is controlling upon us. It is earnestly urged by appellee that this case is not controlling because this court's predecessors in the more recently decided case of Telephone & Telegraph Co. v. Carter, reported in 1 Higgins, 750 held otherwise. The differentiations sought to be made in the latter case from the former do not, as we view the two cases in conjunction with the instant case, control in this case, but, on the contrary, the rule announced in the Witherspoon case by the Supreme Court is controlling.

It is the further insistence of defendant in error that, without reference to the case of Telephone & Telegraph Co. v. Carter, 1 Higgins, 750, a complete answer to this fourth assignment of error is that this is a case tried under a Federal Statute and law and that the construction and interpretation thereof, as well as the substantive

rights of the parties, are governed and controlled by Federal authorities. As is manifest from the Federal Employers' Liability Act, it provides for compensation only. Railroad v. Anderson, 134 Tenn. 683; New York, C. R. Co. v. Winfield, 244 U. S. 147, 149.

[fol. 459] His Honor, the trial judge, properly, we think, permitted the jury to consider certain elements of damage, but he fails to limit the jury to such sums as would constitute compensation. We think this case falls within and is controlled, so far as this court is concerned, by the rule announced in Railroad v. Witherspoon, supra, upon this point. The fourth assignment is accordingly sustained with the result that the case is reversed and remanded to the trial court for a new trial. The costs of the appeal will be paid by the appelle-.

Sansom, Judge.

[fol. 460] IN COURT OF CIVIL APPEALS

February 24th, 1922.

[Title omitted]

JUDGMENT

This cause came on to be heard upon a transcript of the record from the Circuit Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be reversed, and the cause remanded, for the reasons stated by the Court in its opinion filed in this cause, a copy of which will accompany the procedendo on the remand for which let procedendo issue.

It is further ordered and adjudged by the Court that Mrs. Mary Kennedy, Admrx. will pay the costs of this appeal, for which let fi. fa. issue.

[fol. 461] [File endorsement omitted.]

IN THE SUPREME COURT OF TENNESSEE, AT NASHVILLE, DECEMBER TERM, 1921

Davidson County Law Docket

[Title omitted]

PETITION OF JOHN BARTON PAYNE, AGENT, FOR WRITS OF CERTIORARI AND SUPERSEDEAS—Filed Mar. 5, 1923

May it please the court:

This cause was reversed and remanded for a new trial by the Court of Civil Appeals, when it should have been, we think, reversed and dismissed, and we bring to this Court in this way the assignments of error in the Court of Civil Appeals which were considered and overruled, as well as those assignments of error it never considered and passed upon. Counsel for Mrs. Mary Kennedy will, we are advised, bring before the Court in the proper way the assignment of error considered and sustained.

[fol. 462] Your petitioner, John Barton Payne, Director General of Railroads, states the he is much aggrieved by the decision of the Honorable Court of Civil Appeals rendered at Nashville on February 23, 1922, in the above entitled case, in that a judgment of the Circuit Court of Davidson County against your petitioner in favor of Mrs. Mary Kennedy, Administratrix, was simply reversed and remanded for a new trial, when, as your petitioner is advised, the same should have been reversed and dismissed, and petitioner states that the action of this Court is contrary to the law and the facts in the record as will hereinafter be set forth.

This case was instituted in the Circuit Court of Davidson County by Mrs. Mary Kennedy, Administratrix of the estate of her deceased husband, David Kennedy, against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Federal Agent, Director General of Railroads, to recover damages under the Federal Employers' Liability Act for the death of her husband who was killed in a collision between two of the Director General's trains on one of which the deceased was an engineer.

Although the deceased was seventy-two or seventy-three years of age and was largely, if not wholly, responsible for the collision, the [fol. 463] jury returned a verdict of eight thousand dollars. Judgment was rendered thereon, motion for a new trial was duly made, overruled, exception taken and both defendants perfected an appeal in the nature of a writ of error to this Court. (R., pp. 27, 417-418.)*

The Court of Civil Appeals with the consent of adversary counsel dismissed the case as to the corporation, The Nashville, Chattanooga

*Page references in the petition for certiorari in the Supreme Court of Tennessee refer to the record in that court and are not applicable to the record in the Supreme Court of the United States.

& St. Louis Railway, but, as aforesaid, simply reversed and remanded the same so far as the interest of John Barton Payne, Agent and Director General, is concerned.

The Pleadings

The original declaration contained three counts but during the progress of the trial over defendants' objection was amended by the addition of two other counts, which were in substance as follows:

First Count

After certain formal statements, it is averred:

"The plaintiff sues for $25,000.00, as damages and for cause of action states:

[fol. 464] "That on or about the 9th day of July, 1918 the said D. C. Kennedy was in the employ of the defendants, acting in the capacity of engineer on a passenger train, engaged in interstate commerce, routed through Nashville, Shops and Harding, stations in Davidson County, Tennessee, to points north and west of Nashville.

"On the morning of said day, plaintiff's intestate assumed his usual duties at Nashville and in the capacity of engineman was proceeding with said train from Nashville in a westerly direction along the route which included the stations of Shops and Harding. He was in his proper place, in the cab on the right-hand side of the engine, discharging his duties. At a point between Harding and Shops in Davidson County, Tennessee, a collision occurred between the train occupied by plaintiff's intestate and No. 1, a train proceeding in an opposite direction with Nashville as its destination. That said collision was not due to any negligence or carelessness on part of plaintiff's intestate but was due to the negligence and carelessness of other employes of defendants, especially that of the fireman of the engine driven by intestate. Plaintiff's intestate's train was required to wait at Shops and give No. 1 the right of way if it had not already passed No. 1, but before intestate reached Shops a blind train passed [fol. 465] intestate's train on the left and intestate supposed that it was said superior train. Said train passed on the side of the fireman who was riding with intestate but said fireman did not notify, as he should have done, intestate that it was another train. Plaintiff's intestate was in his proper place, in the right-hand cab, and could not see the approaching train which collided with intestate's train because of a long and dangerous curve on which the accident occurred; said curve extended to the left of intestate. It was the custom and duty of the fireman to be on the lookout when the engineman could not see on opposite track and observe and report the passing of superior trains and the negligence and carelessness of intestate's fireman, an employe of defendants, in not looking ahead and warning intestate that No. 1 had not passed, caused the accident and intestate was killed and suffered great physical pain and mental anguish before he died, in all of which plaintiff's intestate was free.

from fault or negligence, and his said death was due to the negligent acts and omissions of defendants as above set forth." (R., pp. 28-30.)

Second Count

The pertinent and different portion of this count is as follows:

[fol. 466] "The management and control of intestate's train was vested in the conductor, an employe of defendants, of said train equally as much, if not more, than it was in intestate. In fact, it was the custom of intestate, as well as engineers acting in a similar capacity, to rely on signals from said conductor when to stop and start said train. Intestate and the conductor were required to wait at Shops and give No. 1 the right of way, but before intestate reached Shops a train passed intestate's train on the left, and as intestate did not receive any signal from the conductor to stop at Shops, intestate supposed it was the train that he was supposed to let pass at or before Shops that had passed him. The said conductor negligently failed to observe that said passing train was not No. 1, and carelessly and negligently failed to give a stopping signal and allowed intestate to proceed. That by reason of said negligence and carelessness on the part of said conductor, and without fault on the part of intestate, the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died." (R., p. 31.)

Third Count

The basis of this count is as follows:

"That said collision was not due to any negligence on the part of [fol. 467] plaintiff's intestate but was due to the negligence and carelessness of other employes of defendants, particularly the operator at Shops who had charge of signaling trains at that point and who failed to signal intestate's train to stop. Plaintiff's intestate was on the right-hand side of the engine and another train or 'blind,' had passed intestate's train on the left, intestate thinking that it was the train he was supposed to let pass at or before Shops. The operator at Shops negligently and carelessly failed to give intestate the stop signal at Shops but, on the contrary, allowed intestate to proceed and threw the switch or allowed it to remain open." (R., p. 32.)

Fourth Count

The basis of this count is as follows:

"That the flagman knew, or should have known, that No. 4 should not have gone on to the single track beyond the Shops until it was definitely ascertained that No. 1 had passed. That the said flagman had been furnished by the conductor with his copy of the train order giving the number of the engine pulling No. 1. That it was the flagman's duty to read train orders, keep them in mind and to remind the conductor, should there be occasion to do so, and there

was particularly such an occasion on the morning in question when [fol. 468] the conductor was busy in a crowded coach, as the flagman well knew. That in utter disregard of his duty, the flagman on No. 4, knowing, or having cause to know, that No. 1 had not passed, failed to remind the conductor of that fact and by reason of said negligence and carelessness on the part of said flagman, the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died.

"It was also the duty of the flagman to be on and protect the rear of the train. As No. 4 passed the Shop Tower the operator then endeavored to signal and stop No. 4, the flagman was not on the rear of the train. Had he been there in his place of duty, the train could have been stopped by the flagman's observing said signal, and because of this negligence of the flagman the accident was not averted, but did occur and intestate was killed because thereof, etc." (R., pp. 34-35.)

Fifth Count

The vital part of this count is as follows:

"That the defendants were negligent under the circumstances in putting on said train a flagman who had no prior experience on said road with passenger trains and who was making his first run on [fol. 469] this train and in not having furnished to said flagman a more specific order as to No. 1. That said flagman, not fully understanding his duties on account of the negligence of defendants, failed to carefully look out for the passage of No. 1 before No. 4 reached the Shops and failed to remind the conductor who was busily engaged in taking up tickets of that fact so that the said conductor did not pull down or angle-cock the train and it was by reason of the negligence of the defendants as aforesaid that the accident occurred and intestate was killed, suffering great physical pain and mental anguish before he died."

A common law plea of not guilty was filed by the Director General of Railroads. (R., p. 37.)

[fol. 470] The Evidence

D. C. Kennedy, aged seventy-two or seventy-three (R., pp. 43, 320-324), was for many years an Engineer on The Nashville, Chattanooga & St. Louis Railway. (R., p. 41.) He continued to act in that capacity during Federal control of railroads and on July 9, 1918, was the engineer on train Number Four, scheduled to leave the Union Station at Nashville, Tenn., at seven A. M. (R., p. 86.)

Said train Number Four collided head-on with train Number One near Bosley, about four miles from said Union Station, about 7.20 A. M. on the morning of July 9, 1918. Engineer Kennedy, his fireman and the train porter, together with about one hundred other persons, were killed and many injured. (R., pp. 82, 100.)

Practical Operation of Trains Numbers One and Four

Train Number Four is a local passenger train running north (or west) from Nashville, Tennessee, to Hickman, Kentucky. It is scheduled to leave the Union Station at 7.00 A. M. every morning. It is composed of an engine, tender, combination baggage and mail car and five coaches. (R., pp. 87, 86, 111-113.)

[fol. 471] Train Number One is a through or fast passenger train running south (or east) from Hollow Rock Junction to Nashville. It is scheduled to arrive at the Union Station at 7.10 A. M. It is composed of an engine, tender, mail and baggage car, day coach and several Pullman cars. (R., pp. 90, 112-113.)

Southbound train Number One is superior to northbound train Number Four and has the right of way over it. (R., pp. 112-113, 193.)

From the Union Station at Nashville to the N., C. & St. L. Shops, about two and one-half miles, is a double track main line. Beyond the Shops there is for several miles a single line of main track. (R., pp. 194-196.)

Between the Union Station and the Shops, trains Number- One and Four operate in a block system controlled and under the direction of the chief dispatcher. (R., pp. 194, 298.)

Beyond the Shops said trains operate on schedules (time tables and superiority of trains) or train orders. Train orders do not apply within the limits of the block system but outside of said block system they control absolutely. Train orders are given only when the prearranged schedule or time table cannot be literally followed. (R., pp. 151, 194, 298.)

[fol. 472] If train Number One does not pass train Number Four before the latter (Number Four) arrives at the Shops it is the absolute, invariable duty (except where an express train order giving authority to proceed has been given) for the engineer to stop at the Shops so it can be ascertained what Number Four should do. (R., pp. 137-138, 151-154, 207.)

Signals at Shop Tower

From the tower at the Shops, just beyond which said double track ends, switches are thrown permitting entry to and from said single and double tracks and the signals indicate the "line up" of these switches. The tower-man does not control the movement of trains; gives no orders or rights to trains; but when a train has obtained authority to move from place to place, simply throws the switches for such movement. When, for instance, the signal shows a "Proceed" indication that gives no right to a train to proceed but is simply information that when the right to move is otherwise obtained the tracks are properly lined up. (R., pp. 196-199, 241, 248, 287, 299.)

Tower operator J. S. Johnson, a thoroughly competent, experienced man (R., p. 288), was asked and answered as follows:

[fol. 473] "Q. The fact that train No. 1 whether it had or hadn't arrived had nothing to do with your control of the signal indicating that the track was lined up if No. 4 had the right to proceed if he wanted to?

A. That was all. Those signals out there don't confer any rights on a train other than the route they are supposed to go over is prepared for the train. That is all the right the signal gives. It don't supersede any other train or anything like that. It simply notifies the engineer that the track is lined up if he has got the right to proceed out on the single track to go on and if not to stop." (R., pp. 303-304.)

Conductor Eubanks, witness for the plaintiff, testified as follows:

"Q. Well under operating conditions as they were on that morning, when an engineer had failed who was on an inferior train to meet a superior train that was then due, when he got to the end of the double track, what was the thing for him to do?

A. Stop." (R., pp. 117-118.)

* * * * * * *

"Q. Now what was the rule and custom with reference to whether or not if train No. 4 had not passed train No. 1 between the Union [fol. 474] Station and Shops, as to where No. 4 was to go, either to go past Shops or stop there?

A. We stop there.

Q. Did you or any other member of the train crew have any train order with reference to No. 1 other than the one that you have testified about?

A. The engineer had a copy of it and the flagman had my copy.

Q. I say, did you have any other order about No. 1 other than that?

A. No, sir, no other order but them two copies.

Q. Now in case you failed to pass No. 1 between Union Station and Shops, in order to get by the Shops what was necessary to have done?

A. Stop and go to the Shop and see will they give you another order against No. 1.

Q. From whom would you get the order?

A. We would get the operator to get it from the train dispatcher." (R., pp. 137-138.)

* * * * * * *

"Q. I will ask you whether or not in those other instances when you had stopped at the Shops the signal arm there, was that clear? [fol. 475] A. I can't tell you that morning.

Q. Sir?

A. I can't tell you anything about it that morning.

Q. I am not asking you about that morning, I am asking you about the other times when you stopped, when the signal arm is up that is a clear track?

A. Yes, sir, supposed to be.

Q. What does it mean when it is down?

A. That is a stop signal.

Q. I will ask you whether or not on a previous morning when No. 1 was late and your train had stopped at the tower and you and the engineer had gotten other orders against No. 1, if in those instances the stop signal hadn't been there?

A. Yes, sir, it was standing against us, when I would go over after orders.

Q. Of course on this particular morning you were in your train and you couldn't see what the signal was and those other mornings you got out to get your orders and could see?

A. Whenever the train would come to a stop I would quit my work and go to see what the delay would be." (R., pp. 139-140.)

* * * * * * *

[fol. 476] "Q. You were asked about this particular morning with reference to the signal at the Shops, whether there was a proceed or whether there was a stop signal, you don't know how it was on this particular morning, do you?

A. No, sir.

Q. When the signal arm is standing straight, vertical, that means a proceed signal?

A. Yes, sir.

Q. And when it is standing at forty-five degrees why that is a stop signal, is that right?

A. Yes, sir.

Q. Now you are governed not by the signals at the Shops as to whether to proceed and go by are you?

A. Well, whenever we went by if I happened to be where I could see the signal, any time before that, it would always be clear.

Q. The point I am asking is this—there was no train register at the Shops, was there?

A. No, sir, no train register.

Q. You were governed by the train orders that were given to you and superiority of the trains, weren't you?

[fol. 477] A. Yes, sir, that is what we are governed by.

Q. Now as-uming that when you left Nashville and you got to the Shops and you saw a proceed signal there, and while you were going with your train order, the position of that signal, if it was at proceed, in view of your train order and the superiority of your trains, that didn't give you any right to go on by the Shops, did it?

A. No, sir.

Q. In other words, unless the engineer knew that train No. 1 had arrived and had gotten past the Shops and had gotten off of the single track, no matter what position the signal at the Shops was standing at, he didn't have any right to go by did he, under the rule?

Objected to by plaintiff because that is a question for the jury.

By the Court: I think it is asking this witness to construe the

rules of the company. I don't see why, under certain circumstances, he shouldn't have the right to do it.

Mr. Walker: In the first place *be* brought this out about the proceed signal there and I am proving what was the custom and the [fol. 478] practice there, in view of the train orders, as to what was the duty of the engineer.

Mr. Norvell: Mr. Walker asked that question under the rules and the rules speak for themselves. This gentleman has testified about the custom but he can't state the conclusions under the custom, that is for the jury. .He can state what happened out there.

Objection overruled and plaintiff excepted.

Question read as follows:

"Q. In other words, unless the engineer knew that train No. 1 had arrived, and had gotten past the Shops, and had gotten off of the single track, no matter what position the signal was standing at at the Shops, he didn't have the right to go by did he, under the rule?

A. No, sir, he didn't have any right to go by.

Q. Now, Mr. Eubanks, train No. 4 was operated, as I believe you have stated, by train orders and by superiority of trains, is that a fact?

A. Yes, sir.

Q. When the signal was at the proceed position that meant, did it or not, that the switches were lined up for train No. 4 to proceed [fol. 479] off of the double track on to the main provided that No. 1 had arrived, or provided further, that No. 4 had a train order to go further than the Shops?

Objected to by plaintiff and overruled.
Plaintiff excepted.

A. Yes, sir, we had to have orders to get any further." (R., pp. 151-154.)

Pertinent Rules

We quote in whole or in part the following pertinent rules, taken from the printed established rules (Exhibit No. 6 to Eubanks' testimony) governing the operation of said trains, to-wit:

"71. A train is superior to another train by right, class or direction.

"Right is conferred by train order; class and direction by time-table.

"Right is superior to class or direction.

"Direction is superior as between trains of the same class.

"Trains in the direction specified by the time-table are superior to trains of the same class in the opposite direction."

"83. A train must not leave its initial station on any division, or [fol. 480] a junction, or pass from double to single track, until it

has been ascertained whether all trains due, which are superior, or of the same class, have arrived or left.

"Conductors and enginemen must consult train registers.

"A train must not leave its initial station on any division without a Clearance Card, Form A." (R., p. 119.)

"87. Inferior trains must keep out of the way of superior trains in the opposite direction, clearing their time as required by rule, and in meeting them must, when practicable, pull into the siding at the nearest end." (R., pp. 119-120.)

"105. Conductor has charge of train and of all persons employed thereon, except when his instructions conflict with the rules or involve risk, in either of which case the engineman will be held alike responsible.

"Under conditions not provided for by the rules, every precaution must be taken to insure protection to life and property."

"211. (*a*) Operators must furnish conductors and engineers a Clearance Card, Form A, with all train orders.

"On passenger trains, conductors must show all train orders to flagmen, and enginemen must show to firemen. On other trains, [fol. 481] conductor must show to rear brakemen, and enginemen must show to firemen and front brakemen.

"Each engineman must receive copies of all train orders, but only the leading engine of a train need be referred to in train orders." (R., p. 93.)

"480. It is their (flagmen) especial duty to protect the rear of their train, and they must allow nothing to interfere with the prompt and efficient discharge of this duty."

"483. (Flagmen) Closely observe fixed signals and train signals; read train orders, keep them in mind and, should there be occasion to do so, remind conductor."

"502. The law requires that the engineman, fireman, or some other person be always on the lookout ahead while the engine is moving. Enginemen will see that this requirement is carried out."

"522. (Firemen) Closely observe train signals; read train orders, keep them in mind and, should there be occasion to do so, remind engineman."

"524. (Firemen) Familiarize yourselves with the train rules, especially instructions, signals and train orders, and assist engineman in their observance. Under the rules for the protection of trains and be prepared to execute them when required."

[fol. 482] The Accident and the Events Immediately Prior Thereto

On the morning of July 9, 1918, the crew of train Number Four was as follows: engineer Kennedy, fireman Meadows, conductor Eubanks, flagman Sinclair and a colored porter. (R., pp. 100-101.) The train left the Union Station at 7:05 A. M., being a few minutes late. (R., p. 88.)

Just prior to leaving, engineer Kennedy and conductor Eubanks (both of whom knew that Number One had not arrived) (R., p.

121) were each handed by the operator at the station the following train order:

Form 19

"Nashville, Chattanooga & St. Louis Railway

"*Train Order No.* 29

Nashville, July 9, 1918.

"To C. & E. No. 4.
"At Nashville.
"No. 4, engine 282, hold main track meet No. 7 Eng. 215 at Harding.
"No. 1 has Eng. 281.

E. V. P., Superintendent."

"Conductor and Engineman must each have a copy of this order.
"Made EM Time 7:00 A. M., Oden, Opr." (R., pp. 88-89.)

[fol. 483] Conductor Eubanks read the same to engineer Kennedy and engineer Kennedy read it back to conductor Eubanks. (R., pp. 88, 91, 120, 121.) Eubanks gave it to his flagman and read it to the porter. (R., p. 91.) Whether Kennedy read it to his fireman, no one knows, as both were killed.

Train Number One was a few minutes late and did not pass train Number Four (which left the station about five minutes late (R., p. 88), between the station and Shops as was customary. (R., p. 137.)

Train Number Four proceeded through the block, which ended at the Shop tower, by proper authority. At that point the semaphore showed a proceed signal which meant that, if Number Four had authority to go beyond the block, then the switch was properly set. Train Number Four proceeded, without stopping, off the double track onto the single main line, in direct conflict with the rules, practice and the train order.

It was engineer Kennedy's absolute bounden personal duty to see whether Number One had passed before he went onto the single track main line.

Engineer Kennedy violated rule 83 providing in part that "a train [fol. 484] must not * * * pass from a double to single track until it has been ascertained whether all trains due, which are superior * * * have arrived. * * *"

Engineer Kennedy violated rule 87 providing in part that "Inferior trains must keep out of the way of superior trains in the opposite direction. * * *"

Enginer Kennedy on the lookout ahead, having the best possible place to see, being able to see, knowing the number of Number One's engine from the train order, deliberately drove his train out upon the single track main line before Number One passed. (R., pp. 127, 245.) His train, Number Four, had no rights on the single track

main line and should have stopped at the Shops. (R., pp. 113, 116, 118, 138, 153, 241, 248.)

It was engineer Kennedy's duty, an absolute, non-delegable, continuing duty to personally see to it that train Number One had passed before Number Four went onto the single track. (R., pp. 138-139, 255, 259, 261-263.)

"Q. Then, Mr. Templeton, as I understand you, if the signal at the shops showed the engineer on Train No. 4 that the signals were set showing that the switches were lined up so as to permit him to go out on to the main, unless the engineer had personal knowledge [fol. 485] that train No. 1 had passed by him between the shops and the Union Station, he had no right to go out?

A. He did not, no sir." (R., p. 207.)

Number Four had no right to leave the double track and enter the single track. Engineer Kennedy violated the written rules, the established custom and practice and the train order, and, apparently with his eyes open drove his train into a death trap.

A few seconds after said train Number Four passed on to the single track the tower operator, Johnson, having ascertained from the Chief Dispatcher that Number One had not arrived, blew the alarm emergency whistle, but no one on train Number Four heard or heeded it. Some railroad employees about the yards gave stop signals but they, too, were not heeded. (R., pp. 290, 297, 303.) The switch engine near the connection with the Tennessee Central Railroad blew its whistle but the crew of Number Four either did not hear it or did not heed it. (R., pp. 302-303.) Said operator did everything possible to stop the train. (R., p. 297.)

Train Number Four ran about two miles and after emerging from a cut about the end of a curve (to the right of the engineer of Number Four), on practically level grade struck Number One. Engineer [fol. 486] Kennedy put on the emergency brakes before the actual collision, though they were nearly simultaneous. (R., p. 371.) Beside the injured nearly one hundred people were killed, including engineer Kennedy, his fireman, Meadows, and the colored porter. (R., pp. 82, 100.)

Activities of Number Four's Crew Just Prior to the Accident

(*a*) Engineer and Fireman.—

Whether the engineer read the train order to the fireman no one knows. Why the engineer violated the rules and established practice no one knows. Why he did not hear, of if heard, did not heed operator Johnson's emergency whistle and other warnings given is not known. Whether the fireman (an experienced, competent man, R., p. 223), was busy shoveling coal or performing other duties while on the double track no one knows. The train order gave the number of the engine of train Number One. That number, in large brass letters, about ten inches high, against a black background,

were on the front of the engine. So too the number was on the tender and side of the sand box. (R., pp. 117, 244-245.)

It was a clear, bright July day and there was nothing to prevent engineer Kennedy from seeing that train Number One had not [fol. 487] passed him while on the double track. The engineer is in front, should always be on the lookout and can see easier and better than anyone else. (R., pp. 122, 127-129, 136, 244.)

(*b*) Conductor.—

This accident happened when the war was at its height and troop movements and the great Powder Plant near Nashville taxed the railroad facilities almost beyond endurance. (R., pp. 191-192, 210.)

Such crowds were on the trains that the conductor was unable to collect all the tickets before arriving at the first stop, resulting in many claims for refunds on alleged unused tickets. (R., p. 123.)

To take care of this situation and enable the conductor to collect all the tickets, engineer Kennedy agreed with conductor Eubanks (a conductor of thirty years experience, and Kennedy's conductor for three years, R., p. 85), to assume the burden of looking out for Number One. (R., pp. 125, 126.) Indeed, it was proved but excluded from the jury, that it was the custom of conductors to more or less rely on their engineers to ascertain if Number One had passed. (R., pp. 385, 388.)

[fol. 488] On this morning the train was crowded and the conductor busily engaged in the necessary work of collecting tickets. (R., pp. 121, 123.) Near the place where Number One usually passed Number Four the conductor heard "something with steam" pass, rushed to see if it was Number One but was blocked off by the crowd of passengers standing in the aisles. (R., pp. 94. 95, 98, 106, 121.)

At this point the track was perfectly straight for a long distance and the engineer, if he had looked could have seen what passed. (R., pp. 367-370.) See also Picture Exhibit No. 7 to Eubanks' testimony.

Supposing that this was Number One, conductor Eubanks proceeded with the performance of his usual duties. He could not have ascertained whether Number One had passed or was passing without stopping his other duties, opening the platform door and looking out. (R., pp. 122-123.) He was not aware of anything wrong until he felt the brakes go in emergency and almost immediately thereafter felt the impact of the collision. (R., pp. 122, 123, 271.)

Of course, the conductor or flagman or any other member of the crew, knowing that the engineer had disobeyed orders, overlooked [fol. 489] signals, or that danger was imminent should have called the engineer's attention to his oversight or applied the brakes from the passenger cars, as could be done. (R., pp. 99, 146, 234, 236, 249.)

(*c*) Porter.—

The colored ported was killed. What he was doing or had done is not known.

(*d*) Flagman.—

Flagman Sinclair was injured. He left the service and refused to come back though frequently requested so to do. On account of the shortage of men he was needed and diligently sought for both to return to work and to be a witness in the case. He never returned and his whereabouts are unknown. (R., pp. 178-9, 378, 379.)

He had previous railroad experience, had passed the customary examinations, had "cubbed" on this very division and was a competent flagman, though this was his first trip on this particular train. (R., pp. 175-180, 188-192.)

It was his duty to help passengers on and off trains and protect the rear of the train. (R., pp. 144, 288, Rule 480.) What he was doing prior to the collision is not known.

[fol. 490] Kennedy's Earnings and Dependents

Mrs. Kennedy testified that her husband was seventy-two years old when he died but the records in the pension department at Washington (he had been a Union soldier in the Civil War), showed that he was seventy-three. (R., pp. 43, 51, 324-326, 327.)

Mrs. Kennedy was 56, her two daughters 21 and 23, respectively, and her son 17 when Mr. Kennedy was killed. (R., pp. 41, 44, 303.)

Mr. Kennedy's earnings amounted, on an average of about $250.00 per month. (R., pp. 45, 162, Exhibit Number One to C. B. Glenn's evidence.)

Mrs. Kennedy, as the widow of a Federal soldier, continues to claim and receive from the Government a pension of $30.00 per month. (R., p. 348.)

Kennedy was a good engineer, a good man to his family and apparently robust for his age.

[fol. 491] Proceedings in the Court of Civil Appeals

In the Court of Civil Appeals your petitioner, plaintiff in error in that Court, assigned six errors. Of these the fifth and sixth were never considered, the first, second and third were considered and overruled, and the fourth considered and sustained. Said assignments, except the fourth, were as follows:

I

The Court erred in overruling the defendants' second, third and fourth grounds of their motion for a new trial, which were as follows:

"2. Because there is no evidence to support the verdict of the jury.

"3. Because the court erred in overruling defendants' motion for peremptory instructions at the close of all the evidence, which motion is as follows:

" 'The defendants, John Barton Payne, Federal Agent, and the Nashville, Chattanooga & St. Louis Railway, move the Court to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced (no verdict) in favor of the plaintiff is justified.'
[fol. 492] " '* * * The defendants move the Court to peremptorily instruct the jury to return a verdict in favor of both defendants on the ground that the evidence shows without a dispute that the primary and proximate and only negligence shown in the proof is that of the deceased.'

"4. Because the Court erred in overruling the motion for peremptory instructions made on behalf of the Nashville, Chattanooga & St. Louis Railway, for the reason that the undisputed proof shows the death of the deceased, D. C. Kennedy, and the accident which brought his death, for which this suit was brought, occurred at a time when the Nashville, Chattanooga & St. Louis Railway was not operating the trains and cars that caused the deceased's death, but the proof shows that said train was being operated by the United States Government, and therefore, under the Cummins-Esch Bill, no recovery could be had aaginst said Railway." (R., p-. 9-10.)

II

The Court erred in overruling the defendants' fifth and sixth grounds of their motion for a new trial, which were as follows:

"5. Because the verdict of the jury, under the law and the facts of the case, is excessive."

[fol. 493] "6. Because the verdict, under the law and facts, is so excessive as to show prejudice, passion and caprice on the part of the jury." (R. p. 10.)

III

The Court erred in overruling the defendants' thirteenth ground of their motion for a new trial, which was as follows:

"13. Because the Court erred in charging the jury as follows:

" 'Now, gentlemen of the jury, if you should find from a preponderance of all the evidence in the case that on July 9th, 1918, the deceased, David Kennedy, was in the employ of the N., C. & St. L. Ry., Walker D. Hines, Director-General of Railroads, Jno. Barton Payne, agent., etc., as a railroad engineer, that on said date about 7 o'clock, A. M., he was in the proper place in the performance of his duties, operating an engine on Train Number Four of defendants' line of road from Nashville, and that said train was engaged in commerce between points in Tennessee and Kentucky, that on said day he was killed while thus engaged, his train colliding with another train running in opposite direction, the plaintiff, as administratrix of his estate, would have the right to recover a verdict at your hands

[fol. 494] provided you should find from a preponderance of all the evidence in the case that the collision of trains in which her said intestate lost his life was the result of the negligence in whole or in part of the fireman in failing to look and observe approaching train No. 1, and to notify deceased that said train, a superior train, had not passed or that it was, in whole or in part, the result of or caused by the conductor's negligence in not watching for train No. 1, and in not warning deceased to stop at Shops to let said train pass or that it was in whole or in part caused by the negligence of the operator at Shops in allowing train No. 4 to pass onto the main track at Shops when train No. 1 had not passed that point, or that it was in whole or in part caused by the negligence of the flagman in failing to assist the conductor by watching for the passing train, No. 1, and in failing to warn the conductor that No. 1 had not passed so as to enable the conductor to stop train No. 4 at Shops and let No. 1 pass at said point or that said collision causing the death of her intestate was in whole or in part caused by the negligence of said flagman in not watching the rear end of train No. 4, thereby protecting same, and in not being at or near the said rear end after passing Shops, and in failing thereby to hear the signal given by the operator at Shops, or that said collision was due in whole or in part to the negligence of the defendants in employing an inexperienced flagman on train No. [fol. 495] 4, on July 9th, 1918, and that because of his inexperience and inability to understand his duties he failed to assist the conductor by watching for train No. 1, and in not notifying said conductor that train No. 1 had not passed, so that he could have the train stopped before coming in contact with train No. 1.

" 'The Court committed error in charging the jury that if they should find from the evidence that the deceased lost his life because of the negligence in whole or in part of the fireman in failing to look out and observe approaching train No. 1, and in failing to notify deceased that said superior train had not passed for the reason that there was no evidence upon which to submit this question to the jury, and because that portion of the excerpt set out in this ground for a new trial fails to mention the fact that said negligence must have been the approximate cause in whole or in part of deceased's death.

" 'The Court committed error further in charging the jury that if they found from the evidence that the deceased's death was caused in whole or in part, by the negligence of the operator at the shops in allowing train No. 4 to pass onto the main tracks at Shops when train No. 1 had not passed that point, for the reason that there was no proof offered upon which the question of negligence of the operator [fol. 496] could properly be submitted to the jury and because that part of said instruction fails to tell the jury that in the event the operator was guilty of negligence, before recovery could he had, such negligence must have been the proximate cause of deceased's death.' " (R., pp. 16-19.)

V

The Court erred in overruling the defendants' nineteenth and twentieth grounds of their motion for a new trial, which were as follows:

"19. Because the Court erred in failing and refusing to give defendants' request No. 1, which is in the following words and figures, to-wit:

" 'I charge that before you can find the defendants liable for any amount that the plaintiff must show by a preponderance of the evidence that the defendants were guilty of some act of negligence alleged in the declaration which in whole or in part was the proximate cause of her intestate's death.'

"20. Because the Court erred in failing and refusing to charge the jury defendants' request No. 2, which is in the following words and figures, to-wit:

" 'If you find from the evidence that the defendants were guilty of some act of negligence alleged in the declaration, but that such act [fol. 497] was not the proximate cause of plaintiff's intestate's death, I charge you that plaintiff can not recover and your verdict must be for the defendants.' " (R., pp. 20-21.)

VI

The Court erred in overruling the defendants' twenty-first ground of their motion for a new trial, which was as follows:

"21. Because the Court erred in failing and refusing to charge the jury defendants' request No. 5, which is in the following words and figures, to-wit:

" 'I charge you that if you find from the evidence that defendants' agents were guilty of some act of negligence alleged in the declaration, which, in whole or in part, was the proximate cause of plaintiff's intestate's death, then and in that event defendants would be liable to the plaintiff for some amount, but I further charge you that the undisputed proof shows deceased to have been guilty of contributory negligence, so that if you find the defendants liable, under the instructions hereinbefore given you must reduce the amount which plaintiff might be entitled to in the absence of contributory negligence on the part of the deceased in proportion to such contributory [fol. 498] negligence as the proof, in your judgment, shows him to have been guilty of.' " (R., p. 21.)

Decision of the Court of Civil Appeals

With reference to the first and third assignments of error which said Court considered together, it was held:

"It appears in proof that there was a register at the shops where was kept a record of all trains and engines that passed. On the morn-

ing of the accident or collision, notwithstanding the fact that No. 1 had not passed, the operator at the shops showed a proceed signal for No. 4. There is some conflict as to what a proceed or clear signal at the shops meant. Johnson, the operator, says that when the arm was up or the proceed signal it meant that 'the route was right for the train to pass No. 4 if she had the right to go.' While —— says, 'it simply notifies the engineer that the track is lined up if he has got the right to proceed.' The defendant only quotes this evidence as to what this signal meant and on the question of the negligence of the operator.

"It appears from the record that Eubank, who had been a conductor on the road for perhaps more than a quarter of a century and [fol. 499] had run on this train for some three years prior to the accident in question, says that theretofore, when No. 1 was late and they would have to stop at the shops for other orders against No. 1, that the signal had not been clear or proceed but a stop signal, and, if this be true, it would seem to constitute some warrant for the jury's seeming finding that it was the practice and custom whenever No. 1 had not passed and orders had to be gotten at the shops as to where to meet, that the Shops operator would display a stop signal, that, if the proceed signal was present the engineer of No. 4 had the right to proceed under the assumption that either No. 1 was in or that they would meet it further down the road at some siding and would receive orders against No. 1 at some station further down the road like Bellevue. The jury were, therefore, in our view, within their province in finding that the operator on this occasion was negligent in violating that custom and that such violation possibly, if not probably, misled Kennedy, the engineer. The operator denies any negligence and defendant says there is absolutely no proof of negligence on his part and no basis for asserting same." (R., pp. 11-12.)

* * * * * * *

"We fail to discover in the record where either the conductor or flagman gave any warning to the engineer or fireman or gave any [fol. 500] stop signal or did practically anything toward ascertaining whether or not No. 1 had passed before No. 4 reached the Shops. While we discover no direct proof as to what took place on the engine, both the engineer and fireman having lost their lives, it seems but reasonable to assume, we think, that the fireman did not observe the rules and didn't stop the train nor warn the engineer to do so. We discover no distinctive evidence that either the conductor or flagman gave any warning to the engineer or pulled the train down, and, so far as the record discloses, they wholly failed to ascertain, as seems to have been their duty to do, whether or not No. 1 had passed before No. 4 reached the Shops. We think it apparent under the record that on the morning of the accident it was the first time the flagman on No. 4 had ever made a trip as such on a passenger train; that he was inexperienced, having been employed some ten days perhaps or two weeks before the accident, and had run on this division on freight trains only a few times before being put upon a passenger train. It

is apparent from the record that a conductor can stop a train when occupying a position toward the rear part thereby by either pulling the bell cord and thus notifying the engineer or he may stop it by angle cocking or pulling the emergency valve. (R., pp. 13-14.)

* * * * * * *

[fol. 501] "We have discovered no direct proof of what occurred in the cab of the engine, and that, of course, is material, both the engineer and fireman being killed, and, that being true, the jury, we think, were warranted in finding in accord with the natural presumption of the instinct of self-preservation that the plaintiff's intestate was in the exercise of ordinary care at the time of the accident. Railroad Company v. Herb, 134 Tenn., 397; Street Railway v. Carroll, 141 Tenn., 265.

An engineer has other duties to discharge than keeping a vigilant lookout ahead and it follows that the question of his contributory negligence in failing to keep such vigilant lookout is one of fact for the jury. Central Railway & Banking Company v. Kent, 87 Ga., 402; L. & N. Railroad Co. v. Hurt, 101 Ala., 34; Hall v. Railway Co., 46 Minn., 439." (R., pp. 14-15.)

* * * * * * *

"While, under the Federal Employers' Liability Act, negligence of co-employes may be an assumed risk, yet this is only so where the negligence was in fact known to the plaintiff or was so customary that he must be charged with knowledge thereof and plaintiff must appreciate the danger. Michigan Railway Co., v. Shoffer, 220 Federal 809, 813; Boldt v. Pennsylvania R. Co., 245 U. S., 441; Railway Co. v. Ward, 252 U. S. 18.

[fol. 502] "Under the facts as found and applicable law, the first and third assignments of error are overruled." (R., p. 16.)

Petitioner now states that the action of the Court of Civil Appeals in failing to sustain its first, second and third and failing to consider, pass upon and sustain its fifth and sixth assignments of error, constitutes error. Formal assignments of error to such action of said Court, and brief and argument in support thereof, are hereto attached and made a part of this petition. Suffice it now to say that the Court of Civil Appeals erred as follows:

1. In holding that there was some evidence of negligence on the part of the Railway.

(*a*) Both fireman and engineer were killed and there is no evidence of what took place in the cab of the engine, yet the Court of Civil Appeals takes the absolutely inconsistent position that in the absence of evidence it can assume that the fireman was negligent but that the engineer was not.

(*b*) Said Court assumed without any evidence that the Railway was negligent in employing a flagman simply because this was his first trip on this particular run in that capacity, the proof showing

[fol. 503] him to be a competent railroad man with sufficient training to properly perform his duties.

(*c*) Said Court held that there was a conflict between the testimony of witnesses Johnson, Templeton and others on the one hand and that of witness Eubanks on the other as to the meaning of the "proceed" signal at the tower. This conclusion of the Court was probably due to the fact that it did not consider all of Eubanks' testimony. At least it only quotes a small part thereof in its opinion. Taking all of Eubanks' testimony, which we have set out in full to the extent it relates to this point, on pages 13, to 19, supra, there was absolutely no conflict and not the slightest doubt as to the fact that this "proceed" signal simply indicated the line-up of the switches and was no authority for the movement of a train in any direction.

(*d*) Said Court in its opinion states that the engineer had duties to perform other than keeping a lookout ahead. It is true he had other duties to perform but there is no evidence that any such duty prevented the maintenance of a constant lookout on his part. Furthermore, the Court wholly misapprehends the proximate cause of this accident. It was not the failure to keep a lookout ahead but [fol. 504] it was the failure to observe the rules and custom which required the engineer of No. Four to stop at the Shops unless he had personal knowledge that Train No. One had already passed him.

(*e*) Said Court fails to appreciate, if we may judge by its opinion, the physical situation of the various railroad employes. We maintain that the law, being predicated upon common sense and the practical operation of railroads, does not impose any duty upon the conductor inside a vestibuled passenger train from which he can only look forward by opening the doors or raising the windows and looking out, to keep a lookout for passing trains, signals and obstructions so as to protect the engineer on the front end of an engine where he can see clearer, better, constantly and more accurately than any other member of the entire train crew, not even excepting the fireman.

2. The Court of Civil Appeals held not only that some of the train crew other than the engineer were negligent but that such negligence was the proximate cause in whole or in part of the collision. They reach this conclusion on the theory, as aforesaid, that the proximate cause of the collision was a failure to keep a lookout, whereas the proximate cause was that the engineer drove his train from the [fol. 505] double track on to the single track contrary to the written rules and the universal, invariable, established custom.

3. The Court of Civil Appeals does not explain in its opinion why the doctrine of assumption of risk was not applicable to this case. It simply cites certain Federal decisions which, of course, correctly state the law. The declaration avers that the deceased was in his proper place on the right hand side of the cab. If that be true and there is no evidence to contradict that averment, the plaintiff was, therefore, bound by it. The danger of collision was perfectly apparent to

the engineer when he passed from the double track to the single track without having personal knowledge that train No. One had passed.

4. The rather large verdict was approved by the Court of Civil Appeals on the theory that the deceased although 73 years of age would continue during his entire life expectancy to serve as a railroad engineer and draw the enormous compensation such work paid. This Court will take judicial cognizance of the fact that a man seventy-three years of age has practically terminated his ability to serve in that capacity.

[fol. 506] 5. Said Court should have but did not consider and sustain the fifth and sixth assignments of error.

Your petitioner now prays for a writ of certiorari to remove this cause from the Court of Civil Appeals to this Honorable Court for review, and to the end that said judgment of the Court of Civil Appeals, to the extent herein attacked, may be reversed and proper judgment be had and rendered transcript of the record in the case is herewith submitted.

To the end that no other action shall be taken pending consideration by this Honorable Court of this petition, assignments of error, brief, argument and transcript, petitioner prays that the writ of certiorari be aided by supersed-as to supersede any action being taken under said judgment of the Court of Civil Appeals until this petition shall have been finally acted upon by this Honorable Court.

Petitioner expresses its willingness to execute any bond that this Honorable Court may deem right and proper in the premises, if any such bond is deemed proper.

This is the first application for writs of certiorari and supersedeas.

[fol. 507] Five days' written notice has been given to counsel for respondent, Mrs. Mary Kennedy, of the filing of this petition.

John Barton Payne, Agent, By Fitzgerald Hall, Attorney.

STATE OF TENNESSEE,
County of Davidson:

I, Fitzgerald Hall, make oath in due form of law that I am one of the counsel for the petitioner in the above cause, and that the statements therein contained are true to the best of my knowledge and belief, and that in my opinion the petitioner is entitled to the relief sought.

Fitzgerald Hall.

Sworn to and subscribed before me, this 23d day of March, 1922. W. A. Miller, Notary Public. (Seal.)

[fol. 508] IN SUPREME COURT OF TENNESSEE

ASSIGNMENT OF ERROR ATTACHED TO AND MADE A PART OF THE FOREGOING PETITION

I

The Court of Civil Appeals erred in overruling petitioner's first assignment of error in that Court, which was as follows:

"The court erred in overruling the defendants' second, third and fourth grounds of their motion for a new trial, which were as follows:

" '2. Because there is no evidence to support the verdict of the jury.

" '3. Because the court erred in overruling defendants' motion for peremptory instructions at the close of all the evidence, which motion is as follows:

' "The defendants, John Barton Payne, Federal Agent, and The Nashville, Chattanooga & St. Louis Railway, move the Court to return a verdict in favor of both defendants upon the ground that under the law and the evidence introduced (no verdict) in favor of the plaintiff is justified.'

' "* * * The defendants move the Court to peremptorily in-
[fol. 509] struct the jury to return a verdict in favor of both defendants on the ground that the evidence shows without a dispute that the primary and proximate and only negligence shown in the proof is that of the deceased.'

"4. Because the court erred in overruling the motion for peremptory instructions made on behalf of The Nashville, Chattanooga & St. Louis Railway, for the reason that the undisputed proof shows the death of the deceased, D. C. Kennedy, and the accident which brought his death, for which this suit was brought, occurred at a time when The Nashville, Chattanooga & St. Louis Railway was not operating the trains and cars that caused the deceased's death, but the proof shows that said train was being operated by the United States Government, and therefore, under the Cummins-Esch bill, no recovery could be had against said Railway.' (R., pp. 9-10.)

II

The Court of Civil Appeals erred in overruling petitioner's second assignment of error in that Court, which was as follows:

"The court erred in overruling the defendants' fifth and sixth grounds of their motion for a new trial, which were as follows:
[fol. 510] " '5. Because the verdict of the jury, under the law and the facts of the case, is excessive.'

" '6. Because the verdict, under the law and facts, is so excessive as to show prejudice, passion and caprice on the part of the jury.' "
(R. p. 10.)

III

The Court of Civil Appeals erred in overruling petitioner's third assignment of error in that Court, which was as follows:

"The court erred in overruling the defendants' thirteenth ground of their motion for a new trial, which was as follows:

" '13. Because the court erred in charging the jury as follows:

' "Now, gentlemen of the jury, if you should find from a preponderance of all the evidence in the case that on July 9th, 1918, the deceased, David Kennedy, was in the employ of the N. C. & St. L. Ry., Walker D. Hines, Director General of Railroads, Jno. Barton Payne, Agent, etc., as a railroad engineer, that on said date about 7 o'clock A. M., he was in the proper place in the performance of his duties, operating an engine on train Number Four of defend- [fol. 511] ants' line of road from Nashville, and that said train was engaged in commerce between points in Tennessee and Kentucky, that on said day he was killed while thus engaged, his train colliding with another train running in opposite direction, the plaintiff, as administratrix of his estate, would have the right to recover a verdict at your hands, provided you should find from a preponderance of all the evidence in the case that the collision of trains in which her said intestate lost his life was the result of the negligence in whole or in part of the fireman in failing to look and observe approaching train No. 1, and to notify deceased that said train, a superior train, had not passed or that it was, in whole or in part, the result of or caused by the conductor's negligence in not watching for train No. 1, and in not warning deceased to stop at Shops to let said train pass, or that it was, in whole or in part, caused by the negligence of the operator at Shops in allowing train No. 4 to pass onto the main track at Shops when train No. 1 had not passed that point, or that it was, in whole or in part, caused by the negligence of the flagman in failing to assist the conductor by watching for the passing train, No. 1, and in failing to warn the conductor that No. 1 had not passed so as to enable the conductor to stop train No. 4 at Shops and let No. 1 pass at said point, or that said collision causing the death of her intestate was, in whole or in part, caused by the negli- [fol. 512] gence of said flagman in not watching the rear end of train No. 4, thereby protecting same, and in not being at or near the said rear end after passing Shops, and in failing thereby to hear the signal given by the operator at Shops, or that said collision was due, in whole or in part, *by* the negligence of the defendants in employing an inexperienced flagman on train No. 4, on July 9th, 1918, and that because of his inexperience and inability to understand his duties, he failed to assist the conductor by watching for train No. 1, and in not notifying said conductor that train No. 1 had not passed, so that he could have the train stopped before coming in contact with train No. 1."

" 'The court committed error in charging the jury that if they should find from the evidence that the deceased lost his life because of the negligence, in whole or in part, of the fireman in failing to

look out and observe approaching train No. 1, and in failing to notify deceased that said superior train had not passed, for the reason that there was no evidence upon which to submit this question to the jury, *and because that portion of the excerpt set* out in this ground for a new trial fails to mention the fact that said negligence must have been the approximate cause, in whole or in part, of deceased's death.

[fol. 513] " 'The court committed error further in charging the jury that if they found from the evidence that the deceased's death was caused, in whole or in part, by the negligence of the operator at the Shops in allowing train No. 4 to pass on to the main track at Shops when Train No. 1 had not passed that point, for the reason that there was no proof offered upon which the question of negligence of the operator could properly be submitted to the jury, and because that part of said instruction fails to tell the jury that in the event the operator was guilty of negligence, before recovery could be had such negligence must have been the proximate cause of deceased's death.' " (R., pp. 16-19.)

IV

The Court of Civil Appeals erred in not considering, pas-ing upon and sustaining the fifth assignment of error in that Court, which was as follows:

"The court erred in overruling the defendants' nineteenth and twentieth grounds of their motion for a new trial, which were as follows:

" '19. Because the court erred in failing and refusing to give defendants' request No. 1, which is in the following words and figures, to-wit:

[fol. 514] " 'I charge that before you can find the defendants liable for any amount that the plaintiff must show by a preponderance of the evidence that the defendants were guilty of some act of negligence alleged in the declaration which, in whole or in part, was the proximate cause of her intestate's death."

" '20. Because the court erred in failing and refusing to charge the jury defendants' request No. 2, which is in the following words and figures, to-wit:

' "If you find from the evidence that the defendants were guilty of some act of negligence alleged in the declaration, but that such act was not the proximate cause of plaintiff's intestate's death, I charge you that plaintiff cannot recover and your verdict must be for the defendants.' " (R., pp. 20-21.)

V

The Court of Civil Appeals erred in not considering, passing upon and sustaining the sixth assignment of error in that Court, which was as follows:

"The court erred in overruling the defendants' twenty-first ground of their motion for a new trial, which was as follows:

[fol. 515] " '21. Because the court erred in failing and refusing to charge the jury defendants' request No. 5, which is in the following words and figures, to-wit:

" 'I charge you that if you find from the evidence that defendants' agents were guilty of some act of negligence alleged in the declaration, which, in whole or in part, was the proximate cause of plaintiff's intestate's death, then in that event defendants would be liable to the plaintiff for some amount, but I further charge you that the undisputed proof shows deceased to have been guilty of contributory negligence, so that if you find the defendants liable, under the instructions hereinbefore given you must reduce the amount which plaintiff might be entitled to in the absence of contributory negligence on the part of the deceased in proportion to such contributory negligence as the proof, in your judgment, shows him to have been guilty of.' " (R., p. 21.)

[fol. 516] [File endorsement omitted]

IN THE SUPREME COURT OF TENNESSEE, AT NASHVILLE, DECEMBER TERM, 1921

[Title omitted]

PETITION OF MRS. MARY KENNEDY, ADMINISTRATRIX FOR WRIT OF CERTIORARI—Filed March 30, 1922

To the honorable the justices of the Supreme Court of Tennessee:

Your petitioner represents and shows that judgment was rendered by the Court of Civil Appeals in this case as hereinafter set out, by which she is greatly aggrieved; and your petitioner is without remedy, save for this petition.

History of the Case

This case was instituted, under the Federal Employers' Liability Act, in the Circuit Court of Davidson County, by Mrs. Mary Kennedy, as Administratrix of the estate of her deceased husband, David Kennedy, on behalf of herself and his other surviving dependents, three children, against the Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Federal Agent, Director General of Railroads, to recover damages for the death of her husband who [fol. 517] was killed on the line of said Railway while he was engaged in interstate commerce.

At the trial in the lower court, the jury rendered a verdict in favor of the plaintiff for $8,000.00. Motion for new trial was overruled

and the defendants perfected an appeal in the nature of a writ of error to the Court of Civil Appeals, making in that Court six assignments of error. The Court of Civil Appeals declined to dismiss the case, but did sustain the fourth assignment of the defendants and reversed and remanded for new trial.

After the trial in the Circuit Court and prior to the hearing in the Court of Civil Appeals, the Supreme Court of the United States decided the case of Missouri Pacific Railroad Company vs. Ault, 1920-21 Advance Opinions, U. S. S. C. 647, 41 Sup. Ct. Rep. 593, and, therefore, your petitioner agreed to a dismissal as to the Nashville, Chattanooga & St. Louis Railway and the cause is now pending only as against John Barton Payne, Agent, etc.

John Barton Payne, Agent, has filed a petition for certiorari because of the failure of the Court of Civil Appeals to sustain other assignments of error and, therefore, to avoid confusion, we will refer in this petition and accompanying brief (as well as in our reply to the petition of Payne) to Mrs. Mary Kennedy, Administratrix, as "plaintiff" and to John Barton Payne, Agent, as "defendant."

Statement of the Case

As the petition filed on behalf of Payne, Agent, covers the whole case and necessitates a rather lengthy reply, we will only here attempt to state briefly that part of the case strictly relevant to this petition.

Kennedy, the deceased, was 72 years of age at the time of his death.

R., pages 41, 43.

[fol. 518] However, all the witnesses who knew him, without contradiction, testified that he was "a very active man," "an extraordinarily active man for his age," "a very vigorous man," that they had never known him to be sick, that he was always on the job, that he looked much younger than he was, walked a great deal, played ball, etc.

R., pages 214, 215, 155, 156, 225, 252, 269, 270.

He was earning at the time of his death an average of $250.00 per month.

R., page 162.

In addition, his income consisted of $25.00 a month from the Government and about $15.00 net from some rent; out of his total income he only reserved about $40.00 or $50.00, therefore gave practically the full amount of his wages received from the defendants to his family.

R., page 51.

He was a kind, liberal and affectionate husband and father.

R., pages 46, 47.

His dependents consisted of his widow, who was stone deaf, two young lady daughters and a son seventeen years of age.

Now, let's see what was the value of the deceased's support for his dependents. It was agreed that the Carlisle Mortality and Annuity tables, as shown in Section 1072 in Gibson's Suits in Chancery, might be and were used in evidence.

R., pages 373, 391.

[fol. 519] The expectancy of a person 72 years of age as shown by said mortality table is 8.16 years. As his family received practically the $3,000.00, multiply same by 8.16, and you have practically $25,000.00 to be received, had he lived, taking his expectancy to be that of the average man. It was proven that he was much more vigorous than the average man and while the Court excluded testimony of Dr. McCabe, who knew him intimately, that he would probably live to 85 years of age, yet from the proof, the jury might well have found that his physical vigor rendered probable such an age. Say, however, his expectancy was only 11 years and that would give $33,000.00.

Only looking at the present value of the sum to be received, and not the sum total, we have a very substantial sum ranging from $16,000.00 for the average person of that age to a much greater sum considering Kennedy as much more vigorous than the ordinary individual of his age.

On the day of his death, i. e. July 9, 1918, Kennedy was engineer on train No. 4, which left the Union Station about seven o'clock A. M. and collided with No. 1 about four or five miles northwest of Nashville, there being killed of the crew, Kennedy, his fireman and the train porter.

R., pages 82, 86.

It was alleged that the conductor, fireman, flagman and operator at the Shops were negligent. The defendant denied any negligence on the part of these employees and also claimed that Kennedy was guilty of gross negligence. This dispute was resolved by the jury in favor of the plaintiff and, under the Federal Employers' Liability Act, even if the plaintiff's intestate were guilty of contributory negligence, this would not bar the action but only go in mitigation of damages. The verdict of the jury was conservative and only represented an amount which Kennedy would have earned in less than three more years.

[fol. 520] The fourth assignment of error of the defendant in the Court of Civil Appeals, was as follows:

"The Court erred in overruling the defendants' fifteenth ground of their motion for a new trial, which was as follows:

'But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason

of advancing years. The jury may further consider the care, attention, advice, and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children and make such pecuniary allowance therefor as in your opinion is warranted by the evidence.'

"The jury were nowhere limited to 'compensation,' the limit of recovery in such a case."

Action of the Court of Civil Appeals

The Court of Civil Appeals, in acting upon another assignment, held that the verdict was not excessive, but it sustained this fourth assignment on the ground that the word "compensation" was not used in the charge.

Opinion of Court of Appeals, pages 19-23.

The Court of Civil Appeals after referring to the case of Railroad v. Witherspoon, 112 Tenn., 128, said:

"As in that, so in the instant case, the word 'compensation' is not used in the charge. The holdings of the courts upon this question [fol. 521] are in irreconcilable conflict but we think this court is relieved, if not precluded, from an extended discussion of this question in view of the latest holding by our Supreme Court in the above case, which is controlling upon us. It is earnestly urged by appellee that this case is not controlling because this court's predecessors in the more recently decided case of Telephone & Telegraph Co. v. Carter, reported in 1 Higgins 750, held otherwise. The differentiations sought to be made in the latter case from the former do not, as we view the two cases in conjunction with the instant case, control in this case, but, on the contrary, the rule announced in the Witherspoon case by the Supreme Court is controlling.

"It is the further insistence of defendant in error that, without reference to the case of Telephone & Telegraph Co. v. Carter, 1 Higgins, 750, a complete answer to this fourth assignment of error is that this is a case tried under a Federal Statute and law and that the construction and interpretation thereof, as well as the substantive rights of the parties, are governed and controlled by Federal authorities. As is manifest from the Federal Employers' Liability Act, it provides for compensation only. Railroad v. Anderson, 134 Tenn. 683; New York C. R. Co. v. Winfield, 244 U. S., 147, 149.

"His Honor, the trial judge, properly, we think permitted the jury to consider certain elements of damage, but he fails to limit the jury to such sum as would constitute compensation. We think this case falls within and is controlled so far as this court is concerned, by the rule announced in Railroad v. Witherspoon, supra, upon this point. The fourth assignment is accordingly sustained with the result that the case is reversed and remanded to the trial court for a new trial. The costs of the appeal will be paid by appellee."

[fol. 522] Petitioner believes and avers that the Court of Appeals was in error in sustaining said assignment because:

1. The charge, considered as a whole, was sufficiently clear on the measure of damages without the use of the word "compensation."

2. This was a case tried under the Federal Employers' Liability Act and the question of proper measure of damages and instructions in regard thereto is governed by the Federal law, and not by the State law, and hence the use of the word "compensation" was unnecessary and the objection of the defendant to said charge in respect to the measure of damages and charge of the Court in regard thereto was not well taken.

3. If said charge, in this respect, was erroneous, same was harmless error.

Therefore, your petitioner assigns error to the action of the Court of Appeals and says:

I

The Court of Civil Appeals erred in sustaining the defendant's fourth assignment of error in that Court, which was as follows:

"The Court erred in overruling the defendants' fifteenth ground of their motion for a new trial, which was as follows:

'15. Because the Court erred in charging the jury as follows:

'But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason [fol. 523]of advancing years. The jury may further consider the care, attention, advice, and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children and make such pecuniary allowance therefor as in your opinion is warranted by the evidence.'

"The jury were nowhere limited to 'compensation,' the limit of recovery in such a case."

R., page 19.

The propositions of law relied upon, the brief in support thereof, and the argument based thereon, will be set out in detail, supported by citations of authority, as well as citations to facts in the record, which brief and argument is filed herewith, and made a part hereof, and marked an exhibit hereto.

Premises considered, your petitioner says that she is without remedy save by this petition, and she, therefore, prays that she may be permitted to file same in this case.

For the reasons above stated, as well as the reasons set out in the argument and brief filed herewith, your petitioner further prays for a writ of certiorari to remove this case to this Court for review, and to that end that the action of the said Court of Civil Appeals in sustain-

ing defendant's fourth assignment of error may be reversed and the proper judgment entered in this Court affirming and approving the verdict, and action of the Circuit Court thereon.

It is further prayed that the transcript of the record in this case be certified, if necessary, and removed to this Court, and that all orders necessary and proper to remove same be made. Petitioner expresses her willingness to execute any bond that this Honorable Court may deem right and proper in the premises.

This is the first application for writ of certiorari in this case.

Five days' written notice has been given to counsel for defendant, [fol. 524] John Barton Payne, Agent, of the filing of this petition.

Mrs. Mary Kennedy, Administratrix, By W. E. Norvell, Jr., Attorney.

STATE OF TENNESSEE,
County of Davidson:

W. E. Norvell, Jr., makes oath in due form of law, that he is one of the attorneys for petitioner in the above case, and that the statements contained in the foregoing petition are true to the best of his knowledge, information and belief, and that, in his opinion, the petitioner is entitled to the relief sought.

W. E. Norvell, Jr.

Sworn to and subscribed before me, this the 30 day of March, 1922. H. Frank Taylor, Notary Public. [Seal.]

[fol. 525] IN SUPREME COURT OF TENNESSEE

May 25th, 1922.

ORDER GRANTING WRITS

In the following cause, the Court is pleased to grant the writs and hold the same under advisement: John Barton Payne, Agent vs. Mrs. Mary Kennedy, Admrx.

[fol. 526] [File endorsement omitted.]

IN SUPREME COURT OF TENNESSEE

[Title omitted.]

Petitions for Writs of Certiorari and Supersedeas

OPINION OF THE SUPREME COURT OF TENNESSEE—Filed May 26, 1923

This action was instituted under the Federal Employers' Liability Act in the Circuit Court of Davidson County, by Mrs. Mary Kennedy, as administratrix of the estate of her husband, David Kennedy, against the Nashville, Chattanooga and St. Louis Railway and John Barton Payne, Federal Agent, to recover $25,000.00 damages for the death of her husband, a locomotive engineer, who was killed in a collision of two trains of the N. C. & St. L. Railway, on one of which he was engineer.

In the Circuit Court the jury found the issues for Mrs. Kennedy and assessed her damages at $8,000.00, and the court gave judgment therefor. The Court of Civil Appeals reversed the case because of an erroneous instruction and remanded it for a new trial.

The accident occurred at about 7:20 A. M. on July 9, 1918, at a point about four miles west of Nashville, when westbound passenger train No. 4 collided, head on, with eastbound passenger train No.1.

Passenger train No. 4 is a westbound train due to leave the Union Station at Nashville at 7:00 o'clock in the morning, daily. Passenger train No. 1 is a train due to arrive at the Union Station at Nashville, from the west, at 7:10 A. M. daily. Under normal circumstances these trains pass each other a short distance west of Nashville. The Railway is double tracked for a distance of 2½ [fol. 527] miles west of Nashville, between the Union Station and a point called "Shops." Beyond Shops the railway is single tracked. At Shops there is located a tower in charge of an employe-, who, under orders from the train dispatcher at Nashville, sets the switches which permit trains to pass from the double tracks to the single track, and from the single track to the proper double track. He also operates a signal device or semaphore, the sole purpose of which is to indicate to trainmen whether or not the switch in front of the train is so set as to enable the train to go forward upon the proper track, if the approaching train has the right to go upon the track. The right of the train to go upon the track is derived from train orders or from schedules and not from the signal device. By the schedules and rules of the railway passenger train No. 1, due to arrive at Nashville at 7:10 in the morning, was a superior train and had the right of way over train No. 4, due to leave Nashville at 7:00 in the morning. In other words, train No. 1 could proceed on the assumption that train No. 4 would be out of the way.

In order to prevent train No. 4 from proceeding west of Shops before train No. 1 had arrived at Shops, the crew of train No. 4 had positive instructions never to pass Shops unless they knew as a fact that train No. 1 in the opposite direction, had passed Shops in the direction of Nashville. If the crew of train No. 4 were uncertain or did not know that train No. 1 had been passed between Shops and Nashville, it was their duty to stop their train at Shops and telephone the train dispatcher at Nashville for orders. Under this system of operation it was incumbent upon the train crew to recognize, by the use of their senses of sight and hearing, Train No. 1 as it passed them [fol. 528] going in an opposite direction on a parallel double track. In case they passed other trains than train No. 1, and similar in appearance; it was, of course, under the system above outlined, incumbent on the train crew to distinguish such other train from train No. 1. This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman. All of these men obviously had other duties to perform. The conductor was required to go through his train and collect tickets and fares. The engineer, seated on the right of the cab of the engine, in addition to keeping a look-out, was concerned with the performance of his engine, the speed and the various gauges in front of him. The fireman in addition to his duties of keeping a look-out, was required to shovel fuel into the fire-box. The flagman was required to protect the rear of the train and to assist the conductor. The safety of the train, the lives of the crew and the passengers depended upon the correctness of the crew's judgment in recognizing and distinguishing train No. 1 as they passed it. A mistake in this respect would almost certainly result in a collision. Hence it was a wise precaution to place the duty to recognize, distinguish and know upon each member of the crew, and not upon one member.

On the morning of the collision the crew of train No. 4 consisted of Conductor Eubanks, in charge of the train, Engineer Kennedy, Fireman Meadows, Flagman Sinclair. The train left the Union Station at Nashville at 7:05 A. M., five minutes before train No. 1, coming into the Union Station from the west, was due to arrive. Just before train No. 4 pulled out Conductor Eubanks and Engineer Kennedy were each handed a train order, which read:

"No. 4 Engine 282 hold main track. Meet No. 7 Eng. 215 at Harding. No. 1 has Eng. 281."

[fol. 529] The conductor and engineer read the order to each other; the conductor gave his copy to the flagman and the presumption is that the engineer read his copy to the fireman.

Harding, the point where No. 4 was to pass No. 7, is west of Shops and west of the point of the collision, and this part of the train order does not enter into the matter. The only reference to train No. 1 was that it had Engine 281. From this, in the circumstances, it is to be inferred that the crew of No. 4 must recognize these *members* which are about ten inches high, on the engine of train No. 1 while passing at a speed of from 25 to 30 miles an hour. To see the num-

bers was the only positive identification. If the crew did not see them it was their duty to stop the train at Shops. They did not see them and they did not stop their train at Shops, because their train collided with No. 1, pulled by Engine 281, some two miles west of Shops.

Train No. 4 was crowded with passengers en route from Nashville to a large government war plant near Nashville. Conductor Eubanks was working his way through the coaches collecting tickets and fares when at a point between Union Station and Shops something passed on the parallel track going in the direction of Nashville. At this moment, the conductor had started to take tickets from the smoking compartment, and when he heard the noise of a train passing he tried to look out the window to determine whether or not it was train No. 1. He saw "something with steam" but was unable to identify it. He heard the noise and saw the steam, but was unable to say whether it was a train similar in appearance to No. 1, or a switch engine, or an engine with cars attached, but he assumed it was No. 1 and continued to take up tickets. He testifies that he relied upon and had confidence in the Engineer, Kennedy, because [fol. 530] he had explained to Kennedy the crowded condition of the *coashed* and had requested Kennedy to look out for No. 1, and Kennedy had agreed to do so. Also he testifies that he relied on the other members of the train crew, whose duty it was to look out for No. 1.

When No. 4 arrived at Shops the semaphore signal was set at proceed, which onlt meant to the crew of No. 4 that if they had the right to go upon the single track west of Shops it was physically possible to do so, and that the switches were properly set for such movement. No. 4 proceeded to pass Shops going at about 20 or 25 miles per hour. The towerman called up the dispatcher and the dispatcher instructed him to stop No. 4 if he could. He blew an emergency whistle which failed to attract the attention of No. 4. A switch engine also blew and some persons attempted to wave No. 4 down, without avail, and it collided, head on, with No. 1 at a point about 1½ miles from Shops, and within three or four minutes after it had passed Shops. A number of people were killed and injured, among them the engineer, Kennedy, and the fireman, Meadows, members of the crew of No. 4. The flagman, Sinclair, disappeared; hence conductor Eubanks is the only member of the train crew who testified.

In the petition for certiorari, and in the assignments of error, brief and argument of the petition, it is said on page 72:

"Under the rules and the established practice, it was Engineer Kennedy's absolute, invariable, nondelegable duty to be on the lookout and not to pass the Shops until he personally knew that train No. 1 had come off the single track. He was unburdened with any duties that would interfere with the continued and effective lookout which it was his duty to keep. There was no emergency, nothing to distract his attention from the rules and customary practice of stopping at the end of the double track unless he had personal knowl-

edge—which of course he did not—that train No. 1 had already passed."

[fol. 531] On page 73:

"There was no negligence on the part of defendants, but the sole, only and proximate cause of this titanic disaster was the criminal negligence of Engineer Kennedy, who, throwing caution to the wind, violated all rules, established practice, and every dictate of common sense and ordinary care."

On page 78:

"It was his absolute duty, not only to look out, but to know definitely, of his own personal knowledge, whether Train No. 1 had passed before he entered the single track."

In reference to the conductor, it is said on page 78:

"The train being crowded, he commenced taking up tickets immediately after leaving the depot. This was his duty and did not constitute negligence. At the point near which Trains Nos. 1 and 4 customarily passed—it being a piece of perfectly straight track—something with steam passed. Conductor Eubanks made an effort to see what that was, but on account of paramount physical limitations, due to the fact that he was inside a vestibue train (not on the lookout ahead as the engineer), which was, due to war conditions, very much crowded, he could not see whether it was Train No. 1 or not, but he supposed, and, we submit, naturally and properly so, that it was Train No. 1. He proceeded to take up his tickets, and knew nothing was wrong until the emergency brakes went on and the collision occurred."

The declaration undertakes to point out specifically the negligence relied upon, and charges the fireman, flagman, conductor and the operator at Shops with specific negligence. The defendants emphatically deny negligence upon the part of any one except the engineer, whom they charge with gross and wanton negligence, which they claim was the sole negligence and the sole proximate cause of injury.

Defendants say, however, that it was the duty of the engineer absolutely to know whether or not he passed No. 1, yet, as far as we can discover, if it was the engineer's duty to absolutely know, it was also the absolute duty of the conductor, as well as other members of the crew, absolutely to know, and even if it be true that the other duties, position and surrounding conditions of the engineer made it [fol. 532] simpler for him to know than the other members of the crew, nevertheless the duty upon the other members to know was imposed upon them by the Company, and, as far as the evidence shows, was accepted by them without qualification.

The fact that the conductor told the engineer that because of other duties he could not look out for No. 1, and advised the engineer that

he must do so, merely proves that the conductor himself was violating a duty, whether he knew it or not. The further fact that the engineer agreed to this means nothing. According to the defendants' own theory, the absolute duty already rested on the engineer to look out for No. 1, and absolutely to know whether No. 1 had passed. If, as the defendants say, that absolute duty rested on him, and rested on him exclusively, then he only agreed to do what he was already bound to do.

It may be argued, however, that the engineer, having agreed with the conductor to be solely responsible for No. 1, assumed the risk. The doctrine of assumed risk rests on contract. If by some strained reasoning it could be made to appear that the engineer had agreed to waive liability for any mishap due to his own mistake or negligence in not discovering No. 1, what did the agreement amount to? Surely he did not agree to release the Railroad Company from liability, for the conductor had no authority to make any such agreement for the Railroad Company, nor did the engineer have any right to make any such agreement. It would seem clearly to be against public policy anyhow. So that the utmost effect that could be given to any such agreement would be that the engineer released the conductor from any blame, as between the conductor and himself. Again, the law, in the case of death, provides for compensation to the widow, children, or other dependents, and the engineer would [fol. 533] have no right by any agreement of his to deprive them of their remedies.

It could not be successfully argued that an agreement between engineer and conductor could deprive a passenger of his rights, but it seems to have been argued that the alleged agreement precludes the engineer, an employee, from maintaining this action. The Federal Employers' Liability Act was enacted for the protection of employes and was no doubt intended to protect them in part against their own indiscretions, mistakes, and sometimes against the obvious neglect of their own duty. In this case, for instance, to say that the engineer, by the alleged agreement, took himself out of the class to be protected would be largely to nullify the law and would be entirely to- narrow an interpretation to put upon it.

In a case in which an engineer brought action for injuries under the Federal Employers' Liability Act, and the Safety Appliance Act, it appeared that the accident was due in part at least to defective brakes and the engineer's disobedience of orders. It was argued that the purpose of the brake requirement was to place control of the train in the hands of the engineer so that the safety of passengers and employes might be conserved, not that the engineer should be able to escape injury from peril to which he had wrongfully exposed himself; and that the engineer could not bring himself within the class intended to be protected by pointing out that the situation created by his disobedience of orders was one that Congress contemplated as possible and the consequence of which it desired to guard against. The argument was not approved by the Court, Mr. Justice Pitney, who delivered the opinion, saying. "This gives altogether too narrow a meaning to the Safety Appliance Act, and is

inconsistent with the provisions of the Employers' Liability Act, as [fol. 534] we shall see."

(Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497; 36 S. Ct. 683, 688, hereinafter referred to.)

Under the old law the engineer impliedly agreed not to hold the company responsible for the negligence of the conductor, a fellow servant, which was one phase of the assumed risk doctrine. The new law—the Federal Employers' Liability Law—comes along and expressly does away with that implied agreement between employer and employee as to fellow servants of the employee; and yet the defendant in this case seems to take the position that although a right of action is given for a fellow servant's negligence, the fellow servant himself can abolish it by an express agreement of his own with another employee, that he may be negligent, and the other employee will throw away a right and remedy against the employer which had been given him by the Congress of the United States.

If the engineer (or his dependents) could be barred of recovery at all in this case on the assumed risk doctrine it would seem to be on the theory only that the engineer assumed the risk of his own negligence, or, expressing it differently, that he assumed the risk of his own violation of the rules of the company and his duty. But the Supreme Court of the United States has held that although an engineer was negligent in the violation of a rule, he was still entitled to recover under the Federal Act.

In Spokane R. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125, in speaking of a motorman on an electric railroad, the Court said:

"From the fact that he discovered and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which [fol. 535] he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberation or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment."

Again, it does not come with very good grace from the Railroad Company to attempt to avoid the conductor's negligence by saying that he did not have time to perform his duty because the train was crowded with passengers and he had to collect tickets. Under its contention two duties rested upon the conductor; one was to collect the fares from the passengers; the other was to know about a passing train, upon which knowledge depended the life and safety of the very passengers from whom these fares were to be collected. Conditions being such that the conductor could not perform both duties,

the duty to collect money surely was not a higher duty than the duty to protect his passengers from injury or loss of life. The jury were warranted in finding that the conductor was negligent.

But whether any specific negligence has been proved or not, the very circumstances and conditions surrounding this accident create a prima facie case of negligence upon some officer, agent or employee of the Railroad Company other than the engineer which in whole or in part proximately caused this accident. Under the Act interstate carriers are liable in damages for injury or death, resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier. Ordinarily, in actions for damages for accident by employee against employer, the doctrine of res ipsa loquitur does not apply. That doctrine in substance is that proof of injury to or death of an employee, without other evidence, does not create even a prime facie presumption of negligence on the part of the employer. Clearly, in the ordinary case it should not do so, be-
[fol. 536] cause the employer's negligence was more frequently the negligence of a fellow servant of the injured or deceased that of any other officer or agent of the employer, nevertheless it is true that surrounding facts and circumstances are looked to much more extensively than could be done under an ordinary action between employer and employee.

In Ridge v. Norfolk-Southern R. R. Co., 167 N. C. 510, 83 S. E. 762, L. R. A. 1917 (*e*), 215, it was held that the res ipsa loquitur doctrine was applicable to cases arising under the Federal Employers' Liability Act.

In McFarlan v. Chesapeake &c. R. R. Co., 177 Ky., 551, 197 S. W. 944, it was declared that

"Though the strict doctrine of res ipsa loquitur does not apply as between master and servant except in modified form where the accident results from defective conditions, conditions which can be explained upon no reasonable assumption other than negligence, and circumstances appear, independent of the accident itself, indicating negligence on the part of the defendant—in such event there is sufficient proof to authorize the submission of the question of the defendant's negligence to the jury."

In Southern R. R. Co. v. Deer, 153 C. C. A. 109, 240 Fed. 73, as to the application of the rule of res ipsa loquitur, it was said:

"It has long been established, that in actions by passengers against carriers the occurrence of an injury (in the usual surroundings) made a prima facie case of negligence; while in actions by employes against carriers the rule was otherwise. Inasmuch as the fact that many accidents are caused by the *en*gligence of a fellow servant, thus preventing the accrual of a right of action to the injured employee, was one of the reasons for holding that the maxim res ipsa loquitur was not applicable to an action by an employee, and inasmuch as this situation has now been changed by statute in actions under the Federal Employers' Liability Act, there is strong ground for saying

that the old decisions, to the effect that the maxim can have no application in an employee's action, are not here to be observed. We are quite content to assume the correctness of this position; but when we concede that the maxim may apply to such an action, it by no means follows that it does apply to the same extent and with the same force as in a passenger action. The distinction is obvious. Passenger actions involve a duty to exercise a very high degree of [fol. 537] care, amounting almost to insurance, and the instances where the accident does not depend upon some negligence of the railroad, or of some employee, are so rare that a general rule may well rest upon the general fact. In an employee's action, the defendant's obligation is only to use ordinary or due care to provide a safe place to work, or proper instrumentalities and methods, and it must be admitted than an unknown but considerable fraction of the injuries to employes are either through accidents or assumptions of risk, or are proximately caused only by plaintiff's carelessness; hence there is, in truth, no such common and dominant probability of negligence as in the passenger cases. We think we give the plaintiff in an employee's case all the benefit of the maxim to which he is entitled when we say that it may apply to aid him; but whether the event does speak, and what it says, depends upon the facts of the particular case."

In Mulligan v. Atlantic Coast Line R. R. Co., 104 S. C. 173, 88 S. E. 445, it was held that proof of negligence may be either by direct or circumstantial evidence.

An- in Union Pacific R. R. Co. v. Hadley, 246 U. S. 330, 38 Sup. Ct. Rep. 318, we find this pertinent language:

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of neglect. Upon that point there can be no question. We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to be of unprecedented violence, and it was open to them to find, in view of circumstances unnecessary to detail, that the despatcher ought not to have sent out Extra 510 West, as he did, and that he was grossly wrong in not allowing 504 to come in, and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor at Potter. It is superfluous to say more upon this point."

So in the instant case we are not left to the mere happening of the accident. If the train which met No. 4 in its general make-up was [fol. 538] similar in appearance to Train No. 1, the only way in which the train crew could have known that it was not No. 1 would have been by seeing clearly, and knowing that they had seen without any mistake, the number on the engine, and meeting at the time and place they did, it would not have been at all unnatural for every member of the crew to have thought that the train was No. 1; but, as has heretofore been shown, their duty was not to think, suppose or assume, but to know, and this duty rested on all of them, and if the engineer was negligent (because of the nature of the duty), the other members of the crew were necessarily negligent for the same reason. If the other members of the crew were not negligent in those circumstances, it follows of necessity that the engineer was not; and yet, of necessity, it must be that if the train were run under conditions making it so easy and so natural for every member of the crew to fall into a mistake of that kind, jeopardizing, not only the lives of themselves, but of many passengers, there must have been negligence on some one or in some other department having charge of the movement of those trains.

On the contrary, if the "something with steam" which met No. 4 at about the place and about the time No. 1 should have met it, was nothing more than a single engine, or even a yard engine with a freight car or two attached, so that the engineer was negligent in not discovering that it was not No. 1, then of necessity the other members of the crew must themselves have been negligent in not discovering it.

The Railroad Company may take either horn of the dilemma it prefers. In either event the court and the jury are not left to the mere happening of the accident. The facts and circumstances speak for themselves, and the conclusion is irresistible, that the Railroad [fol. 539] Company, or some officer, agent or employee of the Railroad Company, other than or in addition to the engineer, was guilty of negligence, proximately causing, in whole or in part, the death of the engineer.

The only other question in the case that gives any trouble is that portion of the charge which defendants contend leaves it to the jury to give such damages as they thought right and proper. This instruction, after reciting the factors to be considered by the jury, instructs the jury to "make such pecuniary allowance therefor as in your opinion is warranted by the evidence." The rule as to the measure of damages under the Federal Employers' Liability Act is that a new and distinct right of action has been created for the benefit of the dependent relatives named in the statute, and that the damages recoverable are limited to such loss as results because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss sustained. If there is no reasonable expectation of pecuniary benefit, or no financial loss sustained, then there can be no recovery under the act. Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 U. S. L. Ed. 417,

Annotated Cases 1914-C176, and note; and a long line of cases cited on pages 1323 of Volume 8, Federal Statutes Annotated 1, Second Edition.

There must appear some reasonable expectation of pecuniary assistance or support of which the beneficiaries have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. Michigan Central R. R. v. Vreeland, supra.

The approved measure of recovery is the present cash value of the future benefits of which the beneficiaries were deprived by the [fol. 540] death, making adequate allowance, according to the circumstances, for the earning power of money. C. & O. R. R. v. Kelly, 241 U. S. 485; 36 S. Ct. 630, 60 U. S. L. Ed. 1117.

In cases brought under the Employers' Liability Act the only right of recovery is that conferred by the statute, and the dam-ges recoverable are only such as are named by its terms. The Supreme Court has repeatedly held that in actions under this Act the measure of damages is the pecuniary loss resulting from death and sustained by the designated beneficiaries. Garrett v. Louisville &c. R. R. Co., 235 U. S. 308, 35 S. Ct. 32; 59 U. S. 242.

The above instruction is certainly objectionable and in strictness is incorrect *by* there is no evidence in the record which tends to show that the verdict was in excess of the pecuniary loss sustained by the beneficiaries. On the contrary the evidence tends strongly to show that the beneficiaries in fact have sustained pecuniary loss in at least the amount of the verdict, and the jury were well warranted in finding their verdict in the amount of Eight Thousand Dollars ($8,000). In this view the improper instruction was harmless error and the case should not be reversed because of it.

Summed up our conclusions are:

First. There is sufficient evidence under the pleadings upon which to find a verdict based on negligence.

This means that if the engineer was negligent his negligence was not the sole negligence and the sole proximate cause of the injury.

Second. The verdi-t should not be set aside because of the evidence of the engineer's *en*gligence.

The engineer's negligence does not bar the action under the Fed- [fol. 541] eral Act, unless it was the sole exclusive negligence and proximate cause, but it should be considered in mitigation of damages. Under the evidence in this record the jury might have found that the engineer's negligence contributed so little to the injury as not to be noticed; but, it might have decided that the damages should be mitigated on account of the engineer's negligence, and as far as we can tell the jury may have allowed liberally for his negligence and still assess the damages at the figure adopted by them. In other words, the Court can not tell from the amount of the verdict, or from anything else in the record, that the jury did not consider the engineer guilty of negligence, or that they did not mitigate the damages because of it.

Third. Under the law and the evidence the engineer did not assume the risk.

Fourth. The instruction or charge on damages did not prejudice the defendants.

Unless the evidence shows clearly that the verdict is largely in excess of the pecuniary loss sustained by the beneficiaries, any error in the charge is harmless error. The beneficiaries are entitled to recover the pecuniary loss sustained by them, and the evidence does not show that the jury gave them more than that. It can make no difference to the defendants whether the jury knew or did not know that the beneficiaries were limited to the pecuniary loss sustained.

The judgment of the Circuit Court will be affirmed.

H. S. Morrison, Sp. J.

[fol. 542] IN SUPREME COURT OF TENNESSEE

[Title omitted]

JUDGMENT

This cause coming on further to be heard upon a transcript of the record from the Circuit Court of Davidson County, petitions for certiorari, answer briefs and argument of counsel; upon consideration whereof the Court is of opinion that in the judgment of the Court of Civil Appeals reversing and remanding this cause for a new trial there is error, and its judgment is reversed and that of the Court below affirmed.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be affirmed and that Mrs. Mary Kennedy Admrx. have and recover of Jas. C. Davis Director General of Railroads the sum of $8,000.00 prin. with interest thereon from the date of the judgment of the Circuit Court to this date $1,237.36 in all the sum of $9,237.36 together with the costs of the Court below for which let fi. fa. issue.

It is further ordered and adjudged by the Court that Jas. C. Davis D. G. prin and Seth M. Walker surety will pay the costs of this appeal for which let fi. fa. issue.

[fol. 543] [File endorsement omitted.]

IN THE SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER SUBSTITUTING JAMES C. DAVIS AS RESPONDENT—Filed May 31, 1923

This cause came on to be heard upon motion to substitute for the defendant John Barton Payne, Agent, his successor in office, James C. Davis, Agent, and it appearing to the Court that John Barton Payne is no longer Director General of Railroads and Agent under Section 206 of the Transportation Act, and that James C. Davis has been appointed and qualified as his successor in that capacity,

It is, therefore, ordered, adjudged and decreed that James C. Davis, Director General of Railroads and Agent, be substituted in the room and stead of John Barton Payne, Agent, defendant below in this case.

Approved for entry, May 28, 1923:
W. E. Norvell, Jr., Attorney for Mrs. Mary Kennedy, Admrx.
Fitzgerald Hall, Attorney for John Barton Payne, Agent.

[fol. 544] [File endorsement omitted.]

IN THE SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER STAYING EXECUTION—Filed May 31, 1923

This cause came on to be heard upon motion on behalf of James C. Davis, Agent, requesting a stay of execution pending application by him to the Supreme Court of the United States for a writ of certiorari, and it appearing to the Court that no action should be taken pending final decision by the Supreme Court of the United States,

It is, therefore, ordered and decreed by the Court that, pending application by James C. Davis, Agent, to the United States Supreme Court for a writ of certiorari and final action by that Court thereon, no further proceedings by way of execution or otherwise be had pursuant to the final decree in this case entered on May 26, 1923, the intent of this order being to retain the status quo of this case as of May 26, 1923, pending final decision of this case by the Supreme Court of the United States.

Approved for entry, May 28, 1923:
W. E. Norvell, Jr., Attorney for Mrs. Mary Kennedy, Admrx.
Fitzgerald Hall, Attorney for James C. Davis, Agent.

[Bill of Costs omitted in printing]

[fol. 545] STATE OF TENNESSEE, *ss:*

IN THE SUPREME COURT

CLERK'S CERTIFICATE

I, David S. Lansden, Clerk of the Supreme Court of the State of Tennessee, do hereby certify that the foregoing Five Hundred forty-five *pages* (545) pages contain a true, perfect and complete copy of the entire transcript of the record, and all proceedings had and done in the Supreme Court of Tennessee in the case of James C. Davis, Director General and Agent, petitioner vs. Mrs. Mary Kennedy, Administratrix, Respondent, Davidson County Law Docket No. — as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in the City of Nashville, this the 4th day of June, 1923.

David S. Lansden, Clerk of the Supreme Court of the Middle Division of the State of Tennessee. (Seal of the Supreme Court, Nashville, Tenn.)

WRIT OF CERTIORARI AND RETURN—Filed Oct. 17, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, Agent, is petitioner, and Mrs. Mary Kennedy, Administratrix of the Estate of Dave Kennedy, deceased, is respondent, which suit was removed into the said Supreme Court by virtue of a writ of certiorari to the Court of Civil Appeals of the State of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the eleventh day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[File endorsement omitted]

[Title omitted]

STIPULATION

Whereas, the Supreme Court of the United States has granted and caused to be executed a writ of certiorari in the above styled case, directed to the Supreme Court of Tennessee, directing it, among other things, to transmit to said the Supreme Court of the United States the record and proceedings in said case, and

Whereas, attached to the petition for certiorari filed by the same James C. Davis was a certified copy of the entire record, and

Whereas, both parties desire to save the additional cost and expense of having prepared and certified another complete copy of the record,

It is, therefore, agreed and stipulated by counsel of both parties that the transcript of record now on file in the Supreme Court of the United States with the said James C. Davis, Agent's petition for

certiorari shall be taken and considered as a full and complete return to said writ.

It is further agreed that this stipulation is to be filed with the Clerk of the Supreme Court of the State of Tennessee to the end that a certified copy thereof may be transmitted in due course to the Supreme Court of the United States.

This Oct. 15, 1923.

Fitzgerald Hall, Attorney for James C. Davis, Petitioner.
W. E. Norvell, Jr., Atty. for Mrs. Mary Kennedy, Admrx., Respondent.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Stipulation of said Court, pronounced at its December term, 1922, in case of Jas. C. Davis, Agent, against Mrs. Mary Kennedy, admrx. of the estate of Dave Kennedy, deceased, as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 15th day of October, 1923.

David S. Lansden, Clerk. [Seal of the Supreme Court, Nashville.]

[Endorsed:] 371—29681.

[File endorsement omitted.]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

James C. Davis, Agent,

Petitioner.

versus

Mrs. Mary Kennedy, Administratrix,

Respondent.

NOTICE OF MOTION AND SUBMISSION.

To Mr. W. E. Norvell, Jr., Attorney for Mrs. Mary Kennedy, Administratrix:

Please take notice that upon certified copy of the transcript of the record herein and upon the annexed petition of the above-named petitioner and the brief attached thereto, the undersigned, on behalf of the said petitioner (having filed said petition, record and motion prior to June 25, 1923), will present or will have the Clerk of the Supreme Court of the United States present the annexed petition for a writ of certiorari to and move the motion hereto annexed before the Supreme Court of the United States in the City

of Washington, District of Columbia, on the first motion day after June 25, 1923 (which will probably be Monday, October 1, 1923), or as soon thereafter as counsel can be heard, and in support of said motion will present to said Court said transcript, petition and brief annexed thereto, copies of which motion, petition and brief are herewith served upon you.

This the 6th day of June, 1923.

FITZGERALD HALL,
Counsel for Petitioner.

Received copy of the above notice, together with the motion, petition and brief, and due and sufficient notice both of the filing and submission of the petition is hereby admitted as of the 8th day of June, 1923.

W. E. NORVELL, JR.,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

James C. Davis, Agent,

Petitioner.

versus

Mrs. Mary Kennedy, Administratrix,

Respondent.

MOTION FOR WRIT OF CERTIORARI.

Now comes the above-named petitioner, by Fitzgerald Hall, his counsel, and moves the Court upon a certified copy of the transcript of record herein, and upon the annexed petition, brief and notice, for a writ of certiorari directed to the Supreme Court of the State of Tennessee to bring before this the Supreme Court of the United States the record in the proceedings entitled "John Barton Payne, Agent, Petitioner, versus Mrs. Mary Kennedy, Administratrix, Respondent, Davidson County Law No. 18," in the said Supreme Court of the State of Tennessee,

wherein final decree was rendered against your petitioner on May 26, 1923, for review and for such other proceedings thereon as to the Court may seem just and for such other and further relief in the premises as justice may require.

JAMES C. DAVIS, Agent.

By FITZGERALD HALL,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

James C. Davis, Agent,

Petitioner.

versus

Mrs. Mary Kennedy, Administratrix,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James C. Davis, Agent,[1] respectfully shows to this Honorable Court the following:

This case was instituted by Mrs. Mary Ken-

---

[1]The suit was originally instituted against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Agent, jointly. It was dismissed as to said Railway because the cause of action, if any, accrued during Federal control of railroads. James C. Davis, Agent, was substituted for John Barton Payne, his predecessor in the office of Director General of Railroads and agent under Section 206 of the Transportation Act.

nedy, Administratrix of the estate of her deceased husband, Dave Kennedy, in the Circuit Court of Davidson County, Tennessee, against the Director General of Railroads to recover damages for the death of her husband, who was killed July 9, 1918, while acting as engineer of one of the Director General's trains. The suit was predicated solely upon the Federal Employers' Liability Act. (R., 37-47.)[1]

There was a verdict and judgment of $8,000 in favor of the plaintiff. (R., 9.) This was reversed by the Court of Civil Appeals—an intermediate appellate court—for error in the charge. (R., 456-459.)

Each party filed a petition for writ of certiorari in the Supreme Court of Tennessee. (R., 461, 516.) Both petitions were allowed and writs issued. (R., 525.) On May 26, 1923, the Supreme Court, the highest court in the State, reversed the Court of Civil Appeals and affirmed the judgment of the trial court, rendering final judgment against your petitioner. (R., 542.)

Your petitioner is advised that said judgment

[1]Page references refer to the side paging of the printed record.

or decree of the Supreme Court of Tennessee is final and erroneous, and that a "title, right, privilege or immunity" was specially set up and claimed under a statute of the United States, namely, the Federal Employers' Liability Act, hence files this his petition for writ of certiorari pursuant to the provisions of Section 237 of the Judicial Code, as amended, and the rules of this Honorable Court.

The Questions Presented are Purely Legal and of General Application

We ask no review of the facts. The statement of the case by the Supreme Court of Tennessee in its opinion is full and fair. (R., 526-531.)

But it has, we believe, announced two principles of law that are erroneous and of such general application as to warrant this Court in reviewing them.

1. It announced as a rule of law that under the Federal Employers' Liability Act the doctrine of assumption of risk applied only to the negligence of a party plaintiff and not to the neg-

ligence of a defendant or of plaintiff's fellow servants, saying:

> "If the engineer (or his dependents) could be barred of recovery at all in this case on the assumed risk doctrine it would seem to be on the theory only that the engineer assumed the risk of his own negligence, or, expressing it differently, that he assumed the risk of his own violation of the rules of the company and his duty." (R., 534.)

The court apparently fell into this error by relying on a case based jointly on the Federal Employers' Liability Act and the Federal Safety Appliance Acts. (R., 534.) It did not appreciate that such cases as *Boldt v. Pennsylvania Railroad*, 245 U. S., 441, 445, and *Pryor v. Williams*, 254 U. S., 43, clearly hold that, where there is no violation of the Safety Appliance Acts, the doctrine of assumption of risk applies to the negligence of a defendant, even if the negligence be that of a plaintiff's fellow servants.

2. The trial judge on the measure of recovery charged the jury to "make such pecuniary allowance therefor as *in your opinion is warranted by the evidence.*" (R., 438.) The Court of

Civil Appeals held this to be error, because the quantum of recovery as thus given was not "compensation," as it should have been, but only the "opinion" of the jury. (R., 456-459.) The Supreme Court admits this to be error, but concludes that it was harmless error, because the record does not affirmatively show that the error was prejudicial. (R., 540.)

Erroneous instructions are presumptively injurious. *Fillippon v. Albion Vein Slate Company*, 250 U. S., 76, 82. There is no presumption that the same result will follow where the law is applied and where it is misapplied. *Louisville & Nashville v. Greene*, 244 U. S., 523, 554.

It would seem clear that had the case been predicated on the common law or a state statute the Supreme Court of Tennessee would have affirmed the Court of Civil Appeals. *Railroad v. Witherspoon*, 112 Tenn., 128, 137; *Jones v. State*, 128 Tenn., 493, 498; *Railway & Light Co. v. Dungey*, 128 Tenn., 587, 596; *Memphis Street Ry. v. Carroll*, 141 Tenn., 265, 269.

But the court seems to think that a *different rule* applies in a case under the Federal Employers' Liability Act.

We insist that in a suit under said Act, even in a state court, we have the absolute right to go to the jury with the law on vital issues correctly charged, else the legal right of trial by jury[1] is an idle and meaningless phrase. Of what avail is a jury trial where the court's instructions are affirmatively erroneous? Of what avail is the right of trial by jury if courts assume that a jury would have returned the same verdict whether the law had been given them correctly or incorrectly?

Your petitioner is advised that the decree or judgment of the Supreme Court of Tennessee is final and erroneous, and that it has no remedy save in filing this petition for a writ of certiorari to require the case to be certified to this Honorable Court for review and determination.

Your petitioner presents herewith as a part of this petition a brief and formal specification of errors showing more fully its views upon the questions involved and a certified transcript of the complete record in the Supreme Court of

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[1]Section 3 of Chapter 149, Act of April 22, 1908, U. S. Compiled Statutes, Section 8659, is conclusive that Congress expected suits under the Federal Employers' Liability Act to be tried by jury.

Tennessee and all proceedings thereon, together with proof of service of notice of the submission of this petition conformably to the rules of this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Tennessee, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Tennessee in this case, which was entitled in that court "John Barton Payne, Agent, Petitioner, vs. Mrs. Mary Kennedy, Administratrix, Respondent, Davidson County Law Number 18," to the end that said cause may be reviewed and determined in this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of the State of Tennessee may be reversed by this Honorable Court.

No writ of supersedeas is needed in this case, but your petitioner hereby specifies its willing-

ness to make bond in any amount for any purpose as the Court may require.

JAMES C. DAVIS, Agent.
By FITZGERALD HALL,
Counsel.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

Fitzgerald Hall, being duly sworn, according to law, on his oath says:

I am the General Counsel of The Nashville, Chattanooga & St. Louis Railway, and as such am counsel for James C. Davis, Agent, in the above cause. I have prepared the foregoing petition, and the statements therein are true of my own knowledge and belief, and I verily believe the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

FITZGERALD HALL.

Sworn to and subscribed before me, this 6th day of June, 1923.

W. A. MILLER,
[Seal] Notary Public.

My commission expires October 2, 1926.

BRIEF.

STATEMENT OF THE CASE.

We quote and adopt the following from the opinion of the Supreme Court of Tennessee:

> "This action was instituted under the Federal Employers' Liability Act in the Circuit Court of Davidson County, by Mrs. Mary Kennedy, as administratrix of the estate of her husband, David Kennedy, against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Federal Agent, to recover $25,000.00 damages for the death of her husband, a locomotive engineer, who was killed in a collision of two trains of the N., C. & St. L. Railway, on one of which he was engineer.
>
> "In the Circuit Court the jury found the issues for Mrs. Kennedy and assessed her damages at $8,000.00, and the court gave judgment therefor. *The Court of Civil Appeals reversed the case because of an erroneous instruction and remanded it for a new trial.*
>
> "The accident occurred at about 7:20 A.M. on July 9, 1918, at a point about four miles west of Nashville, when west-bound

passenger train No. 4 collided, head on, with east-bound passenger train No. 1.

"Passenger train No. 4 is a west-bound train due to leave the Union Station at Nashville at 7: 00 o'clock in the morning, daily. Passenger train No. 1 is a train due to arrive at the Union Station at Nashville, from the west, at 7: 10 A.M. daily. Under normal circumstances these trains pass each other a short distance west of Nashville. The Railway is double-tracked for a distance of 2½ miles west of Nashville, between the Union Station and a point called 'Shops.' Beyond Shops the Railway is single-tracked. At Shops there is located a tower in charge of an employee, who, under orders from the train dispatcher at Nashville, sets the switches which permit trains to pass from the double tracks to the single track, and from the single track to the proper double track. He also operates a signal device or semaphore, the sole purpose of which is to indicate to trainmen whether or not the switch in front of the train is so set as to enable the train to go forward upon the proper track, if the approaching train has the right to go upon the track. The right of the train to go upon the track is derived from train orders or from schedules and not from the signal device. By the

schedules and rules of the Railway passenger train No. 1, due to arrive at Nashville at 7: 10 in the morning, was a superior train and had the right of way over train No. 4, due to leave Nashville at 7: 00 in the morning. In other words, train No. 1 could proceed on the assumption that train No. 4 would be out of the way.

"In order to prevent train No. 4 from proceeding west of Shops before train No. 1 had arrived at Shops, the crew of train No. 4 had positive instructions never to pass Shops unless they knew as a fact that train No. 1, in the opposite direction, had passed Shops in the direction of Nashville. If the crew of train No. 4 were uncertain or did not know that train No. 1 had been passed between Shops and Nashville, it was their duty to stop their train at Shops and telephone the train dispatcher at Nashville for orders. Under this system of operation it was incumbent upon the train crew to recognize, by the use of their senses of sight and hearing, train No. 1 as it passed them going in an opposite direction on a parallel double track. In case they passed other trains than train No. 1, and similar in appearance, it was, of course, under the system above outlined, incumbent on the train crew to distinguish such other train from train No. 1.

This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman. All of these men obviously had other duties to perform. The conductor was required to go through his train and collect tickets and fares. The engineer, seated on the right of the cab of the engine, in addition to keeping a look-out, was concerned with the performance of his engine, the speed and the various gauges in front of him. The fireman, in addition to his duties of keeping a look-out, was required to shovel fuel into the firebox. The flagman was required to protect the rear of the train and to assist the conductor. The safety of the train, the lives of the crew and the passengers depended upon the correctness of the crew's judgment in recognizing and distinguishing train No. 1 as they passed it. A mistake in this respect would almost certainly result in a collision. Hence it was a wise precaution to place the duty to recognize, distinguish and know upon each member of the crew, and not upon one member.

"On the morning of the collision, the crew of train No. 4 consisted of Conductor Eubanks, in charge of the train, Engineer Kennedy, Fireman Meadows, Flagman Sinclair.

The train left the Union Station at Nashville at 7: 05 A.M., five minutes before train No. 1, coming into the Union Station from the west, was due to arrive. Just before train No. 4 pulled out Conductor Eubanks and Engineer Kennedy were each handed a train order, which read:

" 'No. 4 engine 282 hold main track Meet No. 7 Eng. 215 at Harding. No. 1 has Eng. 281.'

"The conductor and engineer read the order to each other; the conductor gave his copy to the flagman, and the presumption is that the engineer read his copy to the fireman.

"Harding, the point where No. 4 was to pass No. 7, is west of Shops and west of the point of the collision, and this part of the train order does not enter into the matter. The only reference to train No. 1 was that it had Engine 281. From this, in the circumstances, it is to be inferred that the crew of No. 4 must recognize these numbers, which are about ten inches high, on the engine of train No. 1 while passing at a speed of from 20 to 30 miles an hour. To see the numbers was the only positive identification. If the crew did not see them it was their duty to stop the train at Shops. They did not see them and they did not stop their

train at Shops, because their train collided with No. 1, pulled by Engine 281, some two miles west of Shops.

"Train No. 4 was crowded with passengers en route from Nashville to a large government war plant near Nashville. Conductor Eubanks was working his way through the coaches collecting tickets and fares when at a point between Union Station and Shops something passed on the parallel track going in the direction of Nashville. At this moment, the conductor had started to take tickets from the smoking compartment, and when he heard the noise of a train passing he tried to look out the window to determine whether or not it was train No. 1. He saw 'something with steam,' but was unable to identify it. He heard the noise and saw the steam, but was unable to say whether it was a train similar in appearance to No. 1, or a switch engine, or an engine with cars attached, but he assumed it was No. 1 and continued to take up tickets. He testifies that he relied upon and had confidence in the engineer, Kennedy, because he had explained to Kennedy the crowded condition of the coaches and had requested Kennedy to look out for No. 1, and Kennedy had agreed to do so. Also he testifies that he relied on the other mem-

bers of the train crew, whose duty it was to look out for No. 1.

"When No. 4 arrived at Shops the semaphore signal was set at proceed, which only meant to the crew of No. 4 that if they had the right to go upon the single track west of Shops it was physically possible to do so, and that the switches were properly set for such movement. No. 4 proceeded to pass Shops, going at about 20 or 25 miles per hour. The towerman called up the dispatcher, and the dispatcher instructed him to stop No. 4 if he could. He blew an emergency whistle, which failed to attract the attention of No. 4. A switch engine also blew and some persons attempted to wave No. 4 down, without avail, and it collided, head on, with No. 1 at a point about 1½ miles from Shops, and within three or four minutes after it had passed Shops. A number of people were killed and injured, among them the engineer Kennedy, and the fireman, Meadows, members of the crew of No. 4. The flagman, Sinclair, disappeared; hence conductor Eubanks is the only member of the train crew who testified.

"In the petition for certiorari, and in the assignments of error, brief and argument of the petition, it is said on page 72:

" 'Under the rules and the established

practice, it was Engineer Kennedy's absolute, invariable, non-delegable duty to be on the lookout and not to pass the Shops until he *personally knew* that train No. 1 had come off the single track. He was unburdened with any duties that would interfere with the continued and effective lookout which it was his duty to keep. There was no emergency, nothing to distract his attention from the rules and customary practice of stopping at the end of the double track unless he had personal knowledge—which of course he did not—that train No. 1 had already passed.'

"On page 73:

" 'There was no negligence on the part of defendants, but the sole, only and proximate cause of this titantic disaster was the criminal negligence of Engineer Kennedy, who, throwing caution to the wind, violated all rules, established practice, and every dictate of common sense and ordinary care.'

"On page 78:

" 'It was his absolute duty, not only to look out, but to know definitely, of his own personal knowledge, whether train No. 1 had passed before he entered the single track.'

"In reference to the conductor, it is said on page 78:

" 'The train being crowded, he commenced taking up tickets immediately after leaving the depot. This was his duty and did not constitute negligence. At the point near which Trains Nos. 1 and 4 customarily passed—it being a piece of perfectly straight track—'something with steam' passed. Conductor Eubanks made an effort to see what that was, but on account of paramount physical limitations, due to the fact that he was inside a vestibule train (not on the lookout ahead as the engineer), which was, due to war conditions, very much crowded, he could not see whether it was Train No. 1 or not, but *he supposed*, and, we submit, naturally and properly so, that it was Train No. 1. He proceeded to take up his tickets, and knew nothing was wrong until the emergency brake went on and the collision occurred.'

"The declaration undertakes to point out specifically the negligence relied upon, and charges the fireman, flagman, conductor and the operator at Shops with specific negligence. The defendants emphatically deny negligence upon the part of any one except the engineer, whom they charge with gross and wanton negligence, which they claim was the sole negligence and the sole proximate cause of injury.

"Defendants say, however, that it was the duty of the engineer absolutely to know whether or not he passed No. 1, yet, as far as we can discover, if it was the engineer's duty to absolutely know, it was also the absolute duty of the conductor, as well as other members of the crew, absolutely to know, and even if it be true that the other duties, position and surrounding conditions of the engineer made it simpler for him to know than the other members of the crew, nevertheless the duty upon the other members to know was imposed upon them by the company, and, as far as the evidence shows, was accepted by them without qualification." (R., 526-532.)

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Tennessee erred in announcing as a principle of law that in a suit based on the Federal Employers' Liability Act an injured employee could only assume the risk of his own negligence and that he could not in any event assume the risk of the negligence of a defendant and of his, the plaintiff's, fellow servants. (R., 534.)

2. The Supreme Court of Tennessee erred in holding it to be harmless error to leave it to a jury to determine the size of the verdict without the statutory limitation of "compensation," the jury being affirmatively limited only to "such pecuniary allowance therefor as in your opinion is warranted by the evidence." (R., 438, 540.)

ARGUMENT.

I.

Our case here is in narrow compass. We contend that the deceased engineer, Kennedy, assumed the risk of the danger created by the negligence of himself and his fellow servants. The Supreme Court held that the doctrine of assumption of risk was not applicable—not because of the facts of the case, *but because under the Federal Employers' Liability Act that doctrine was never applicable to the negligence of a defendant or of a fellow servant.* To support that conclusion the Supreme Court relied solely on *Spokane, etc., R. R. v. Campbell*, 241 U. S., 497. (R., 534.) In the Campbell case the doctrine of assumption of risk could not be successfully invoked because of the violation of the Safety Appliance Acts. In the case at bar there was no claim that there was a violation of the Safety Appliance Acts, the case being predicated alone upon the Federal Employers' Liability Act.

That the Supreme Court of Tennessee announced an erroneous rule of law is obvious from an inspection of the following cases:

Seaboard Air Line v. Horton, 233 U. S., 492, 508.
Great Northern v. Wiles, Admr., 240 U. S., 444, 448.
Jacobs v. Southern R. R., 241 U. S., 229.
Chesapeake & O. R. R. v. DeAtley, 241 U. S., 310.
Boldt, Admrx., v. Pennsylvania R. R. Co., 245 U. S., 441, 445.
Pryor v. Williams, 254 U. S., 43.

We repeat the facts:[1]

Petitioner's trains Numbers One and Four collided head-on on a single main line track about four miles from the Union Station at Nashville, at 7: 20 A.M., July 9, 1918. Train Number One, being south-bound (or east), was under the rules superior to Train Number Four, north-bound (or west). (R., 95, 113, 115, 206.)

From the Union Station at Nashville to the petitioner's Shops, a distance of about two and one-half miles, there is a double track main line. Beyond that point for several miles is a single line of main track. (R., 207-209.)

[1]For the convenience of the Court we cite the record supporting the facts as found by the Tennessee Supreme Court. We concur absolutely in that court's statement of the case.

Between the Union Station and the Shops said two trains operate in a block system, controlled and under the direction of the Chief Dispatcher. Beyond the Shops said trains operate on schedule or train orders. (R., 164, 207, 310.)

It was the personal, non-delegable duty of the engineer of train Number Four to know that train Number One had passed before leaving the double track, and the rules and invariable custom required the engineer to stop his train at the Shops and proceed no further without orders *unless he himself personally knew that said train Number One had passed.* (R., 126, 131, 150-151, 164-167, 220, 254, 261, 268, 272, 274-276.)

Train Number Four had no right to leave the double track and enter the single track. Engineer Kennedy violated the written rules, the established custom and practice (with which he was perfectly familiar), with the train order (which he had read a few minutes before) in his hand, and without excuse or justification, apparently with his eyes open, he drove his train into what any reasonable person in his position is bound to have known was a veritable death-

trap. (R., 126-128, 151-152, 166, 254-261, 272-276.)

The operator at the Shops tower keeps certain records, but the trainmen *do not register there.* (R., 154.)

Such operator or towerman has no control over the movements of trains, gives no orders or rights to trains, but simply throws switches for such movements. The "proceed" signal simply indicates to the engineer the line-up of the switches. It neither gives nor denies authority to move. For instance, when the signal shows a "proceed" indication, that signal gives a train no right to proceed, but is simply information that when such right to proceed is *otherwise and otherwheres obtained* the switches are properly set for such a movement. (R., 131, 151-154, 164-167, 209-212, 254, 261, 300, 312, 316-319.)

Pertinent rules make south-bound trains superior to north-bound trains, and *forbid the movement of a train from a double track to a single track until superior trains of the same class running in the opposite direction have arrived.* The obligation to keep out of the way of

superior trains is imposed upon inferior trains. (R., 132-133.)

Train Number Four left the Union Station a few minutes late. The operator had handed both conductor Eubanks and Engineer Kennedy a train order, advising them, among other things, that superior south-bound train Number One had engine No. 281. Eubanks and Kennedy read this order to each other. Kennedy mounted his engine and drove it along the double track to the Shops tower, during which time train Number One had not passed, *so that it became Kennedy's absolute, non-delegable duty in accordance with both the rules and established practice to stop said train at the end of the double track. This, without excuse or justification, under no unusual circumstances, he failed to do, and drove his train a few seconds later headlong into train Number One.* (R., 101-104, 126-141, 133-134, 151-152, 220, 254, 261, 268-276.)

We submit that these facts show clearly that the danger was open and obvious and the result so certain and imminent that Engineer Ken-

redy, as a matter of law, assumed the risk of the danger resulting from the admitted failure of his fellow servants to warn him that train Number One had not passed.

He was in a place where he could see sooner and better and more constantly than any one else. In broad daylight he had been a few minutes before the collision told that Number One had not come in, he was handed and read a train order enabling him to positively and unmistakably identify train Number One. The only thing he had to do to protect himself and the train was to follow the established practice, with which he was thoroughly familiar, and obey simple and reasonable rules which were nothing more or less than the embodiment of common sense into the practical operation of trains. *It was his absolute duty before leaving the double track to personally know that train Number One had passed.*

When he pulled out onto the single track beyond the Shops, the danger of that act and the inevitable consequences were so open and obvious that any person in the exercise of ordinary care would have known and appreciated the dan-

ger. With his eyes open to the full knowledge of all the facts, he deliberately entered the single track without ascertaining whether train Number One had passed, so that he is bound, as any reasonably intelligent person would have been, to have known that the collision was imminent and inevitable.

The facts found by the Tennessee Supreme Court clearly show that, applying the correct rule of law, Kennedy assumed the risk of the danger existing at and just prior to his death, so that his administratrix cannot recover therefor.

II.

Under the Federal Employers' Liability Act the limit of recovery is "compensation." The charge of the trial judge was not silent—not simply meager. It presented to the jury a rule to guide them, and that rule was erroneous. The award was not to be "compensation" as shown by the evidence, but "such pecuniary allowance therefore as in your opinion is warranted by the evidence." The excellent opinion

of the Court of Civil Appeals on this point will be found on pages 456-459 of the record.

The Supreme Court admits that this was error, but held that it was harmless error. (R., 540.)

It is not disputable that the measure of recovery under the Federal Employers' Liability Act is "compensation." *Chesapeake & Ohio v. Kelly*, 241 U. S., 485, 489; *New York Central v. Winfield*, 244 U. S., 147, 149.

Where a charge is erroneous, prejudice is presumed. *Fillippon v. Albion Vein Slate Co.*, 250 U. S., 76, 82.

There can be no presumption that there will be the same result when the law is followed and when the law is not followed. *Louisville & Nashville R. R. v. Greene*, 244 U. S., 522, 554.

Of course, the record does not and could not show the ratiocination of the jury. A litigant who relies on an error in the charge does not have to affirmatively show wherein prejudice resulted. Prejudice is presumed from the fact

of error. He who claims the error to be innocuous must point out wherein there was no prejudice. The record discloses no basis for the pure assumption that the error was innocuous. Indeed, it shows that Kennedy violated the usual custom and practice and his orders, hence was guilty of the grossest negligence (R., 126-128, 151-152, 166, 254-261, 272-276); that he was seventy-three when he died (R., 56, 64, 337-339, 340); that his widow was fifty-six years old and his two daughters twenty-one and twenty-three, respectively, and his son seventeen (R., 54, 57, 316); and that his widow continued to receive a pension of $30.00 per month from the Federal Government (R., 360).

With these undisputed facts before them, no court can, we think, assume the burden of saying that the jury would have rendered a verdict of the same size whether the measure of damages given them for their guidance by the trial judge was right or wrong. We have a right to go to trial with the law correctly charged.

Our jury system is predicated upon the belief that a jury will intelligently apply the law as given them by the court to the facts as they find

them from the evidence. To assume that the same result will be reached whether the instructions of the court are right or wrong is to deny the efficacy of and ultimately destroy the jury system.

There are, of course, many instances of innocuous error. But the instant case is not one of that character. A rule to guide the jury was given and that rule was inaccurate. The result, naturally, was wrong.

In a case predicated on a Federal Statute such as the Federal Employers' Liability Act, a defendant has the right to a trial before a jury wherein the measure of its liability is correctly stated. It is not a question of meagerness—of omission. A rule—a yardstick—was given and that rule was wrong. It is not sufficient to say that the jury might have reached the same conclusion even if the law had been given them correctly.

We respectfully ask that the case be reversed.

Respectfully submitted,

FITZGERALD HALL,
Counsel.

FRANK SLEMONS,
SETH M. WALKER,
Of Counsel.

FILED
FEB 12 1924
WM. R. STANSBU
CLE

Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Agent,
Petitioner,

vs. No. [redacted]85

MRS. MARY KENNEDY, Administratrix,
Respondent.

BRIEF FOR PETITIONER.

FITZGERALD HALL,
Counsel for Petitioner.

FRANK SLEMONS,
SETH M. WALKER,
Of Counsel.

February 18, 1924.

McQUIDDY PRINTING CO., NASHVILLE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

James C. Davis, Agent,

Petitioner,

versus

No. 371.

Mrs. Mary Kennedy, Administratrix,

Respondent.

BRIEF FOR PETITIONER.

May it Please the Court:

Mrs. Mary Kennedy, as administratrix of the estate of D. C. Kennedy, sued the Director General of Railroads to recover damages for the death of her husband while acting as engineer on one of the Director General's trains on the lines of The Nashville, Chattanooga & St. Louis Railway.*

*The suit was originally instituted against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Agent, jointly. It was dismissed as to said Railway, because the cause of action, if any, accrued during Federal control of railroads. James C. Davis, Agent, was substituted for John Barton Payne, his predecessor in the office of Director General of Railroads and Agent, under Sections 206 of the Transportation Act. (Rec., 202, 252.)

The suit was predicated solely upon the Federal Employers' Liability Act. The Safety Appliance Acts were not involved. (R., 16-20.)*

There was a verdict and judgment of eight thousand dollars in favor of the plaintiff. (R., 2.) This was reversed by the Court of Civil Appeals—an intermediate appellate court—for error in the charge, that Court sustaining the Director General's fourth assignment of error. (R., 209-221.) Both parties, being dissatisfied with the decision of the Court of Civil Appeals, filed separate petitions for writs of certiorari in the Supreme Court of Tennessee. (R., 212, 235.) Both petitions were allowed and the entire case transferred to the Supreme Court of Tennessee. (R., 240.)

The Supreme Court of Tennessee reversed the action of the Court of Civil Appeals and affirmed the judgment of the trial court in an opinion found on page 241 *et sequitur* of the printed record. The opinion of said Court contained a rather full statement of the ultimate facts. We

*Page references are to the printed, not to the original record. Page references in the petition for certiorari were to the original record.

ask no review thereof and are thoroughly content with that statement.

That learned Court did, we believe, commit two errors of law, respectively, as follows:

1. It held that the doctrine of assumption of risk was not applicable to this case—not because of the facts, but because under the Federal Employers' Liability Act an employee cannot assume the risk of the negligence of either the employing carrier or its employees. In other words, under no circumstances can an employee assume the risk incident to and resulting from the negligence of his fellow servants. (R., 246, 249, 251.)

2. It agreed with the Court of Civil Appeals that said fourth assignment of error filed by the Director General of Railroads was sound and that the charge of the trial court as therein complained of was erroneous. However, it concluded that the error was innocuous, and therefore did not justify a reversal and remand of the case. It held that it was harmless error to leave a jury free to determine the size of the verdict, without the statutory limitation of "compensation," the jury being limited only to

"such pecuniary allowance therefore as in your opinion is warranted by the evidence." (R., 195-196, 249-251.)

STATEMENT OF THE CASE.

We made numerous questions in the Tennessee courts which, however meritorious, may not properly be submitted here on certiorari. We therefore confine ourselves in the statement of the case to only so much thereof as may be pertinent to the proper appreciation and determination of the two questions of law which we submit to this Court.

A statement of the pleadings is unnecessary save to say that the cause of action was predicated solely and alone upon the Federal Employers' Liability Act. (R., 16-20.)

As aforesaid, we are content with the succinct statement of the case as made by the Supreme Court of Tennessee in its opinion. In our petition for certiorari, directed to the Supreme Court of Tennessee, we made a very complete and accurate statement of the case and the evi-

dence. (R., 212 *et sequitur.*) It is unnecessary to repeat this here. We simply quote and adopt the statement of facts as made by the Tennessee Supreme Court (R., 241-243):

> "The accident occurred at about 7: 20 A.M., on July 9, 1918, at a point about four miles west of Nashville, when westbound passenger train No. 4 collided, head on, with eastbound passenger train No. 1.
>
> "Passenger train No. 4 is a westbound train due to leave the Union Station at Nashville at 7: 00 o'clock in the morning, daily. Passenger train No. 1 is a train due to arrive at the Union Station at Nashville, from the west, at 7: 10 A.M. daily. Under normal circumstances these trains pass each other a short distance west of Nashville. The Railway is double-tracked for a distance of 2½ miles west of Nashville, between the Union Station and a point called 'Shops.' Beyond Shops the Railway is single-tracked. At Shops there is located a tower in charge of an employee, who, under orders from the train dispatcher at Nashville, sets the switches which permit trains to pass from the double tracks to the single track, and from the single track to the proper double track. He also operates a

signal device or semaphore, the sole purpose of which is to indicate to trainmen whether or not the switch in front of the train is so set as to enable the train to go forward upon the proper track, if the approaching train has the right to go upon the track. The right of the train to go upon the track is derived from train orders or from schedules and not from the signal device. By the schedules and rules of the Railway, passenger train No. 1, due to arrive at Nashville at 7: 10 in the morning, was a superior train and had the right of way over train No. 4, due to leave Nashville at 7: 00 in the morning. In other words, train No. 1 could proceed on the assumption that train No. 4 would be out of the way.

"In order to prevent train No. 4 from proceeding west of Shops before train No. 1 had arrived at Shops, the crew of train No. 4 had positive instructions never to pass Shops unless they knew as a fact that train No. 1, in the opposite direction, had passed Shops in the direction of Nashville. If the crew of train No. 4 were uncertain or did not know that train No. 1 had been passed between Shops and Nashville, it was their duty to stop their train at Shops and telephone the train dispatcher at Nashville for orders. Under this system of operation, it

was incumbent upon the train crew to recognize, by the use of their senses of sight and hearing, train No. 1 as it passed them going in an opposite direction on a parallel double track. In case they passed other trains than train No. 1, and similar in appearance, it was, of course, under the system above outlined, incumbent on the train crew to distinguish such other train from train No. 1. This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman. All of these men obviously had other duties to perform. The conductor was required to go through his train and collect tickets and fares. The engineer, seated on the right of the cab of the engine, in addition to keeping a lookout, was concerned with the performance of his engine, the speed, and the various gauges in front of him. The fireman, in addition to his duties of keeping a lookout, was required to shovel fuel into the firebox. The flagman was required to protect the rear of the train and to assist the conductor. The safety of the train, the lives of the crew and the passengers depended upon the correctness of the crew's judgment in recognizing and distinguishing train No. 1 as they passed it. A

mistake in this respect would almost certainly result in a collision. Hence it was a wise precaution to place the duty to recognize, distinguish and know upon each member of the crew, and not upon one member.

"On the morning of the collision the crew of train No. 4 consisted of Conductor Eubanks, in charge of the train, Engineer Kennedy, Fireman Meadows, Flagman Sinclair. The train left the Union Station at Nashville at 7: 05 A.M., five minutes before train No. 1, coming into the Union Station from the west, was due to arrive. Just before train No. 4 pulled out, Conductor Eubanks and Engineer Kennedy were each handed a train order, which read:

" 'No. 4 engine 282 hold main track. Meet No. 7 Eng. 215 at Harding. No. 1 has Eng. 281.'

"The conductor and engineer read the order to each other; the conductor gave his copy to the flagman, and the presumption is that the engineer read his copy to the fireman.

"Harding, the point where No. 4 was to pass No. 7, is west of Shops and west of the point of the collision, and this part of the train order does not enter into the matter. The only reference to train No. 1 was that it had Engine 281. From this, in the cir-

cumstances, it is to be inferred that the crew of No. 4 must recognize these *members* (numbers) which are about ten inches high, on the engine of train No. 1, while passing at a speed of from 25 to 30 miles an hour. To see the numbers was the only positive identification. If the crew did not see them it was their duty to stop the train at Shops. They did not see them and they did not stop their train at Shops, because their train collided with No. 1, pulled by Engine 281, some two miles west of Shops.

"Train No. 4 was crowded with passengers en route from Nashville to a large government war plant near Nashville. Conductor Eubanks was working his way through the coaches collecting tickets and fares when at a point between Union Station and Shops something passed on the parallel track going in the direction of Nashville. At this moment the conductor had started to take tickets from the smoking compartment, and when he heard the noise of a train passing he tried to look out of the window to determine whether or not it was train No. 1. He saw 'something with steam,' but was unable to identify it. He heard the noise and saw the steam, but was unable to say whether it was a train similar in appearance to No. 1, or a switch en-

gine, or an engine with cars attached, but he assumed it was No. 1 and continued to take up tickets. He testifies that he relied upon and had confidence in the engineer, Kennedy, because he had explained to Kennedy the crowded condition of the coaches and had requested Kennedy to look out for No. 1, and Kennedy had agreed to do so. Also he testifies that he relied on the other members of the train crew, whose duty it was to look out for No. 1.

"When No. 4 arrived at Shops the semaphore signal was set at proceed, which only meant to the crew of No. 4 that if they had the right to go upon the single track west of Shops it was physically possible to do so, and that the switches were properly set for such movement. No. 4 proceeded to pass Shops going at about 20 or 25 miles per hour. The towerman called up the dispatcher and the dispatcher instructed him to stop No. 4 if he could. He blew an emergency whistle which failed to attract the attention of No. 4. A switch engine also blew and some persons attempted to wave No. 4 down, without avail, and it collided, head on, with No. 1 at a point about 1½ miles from Shops, and within three or four minutes after it has passed Shops. A number of people were killed and injured, among

them the engineer, Kennedy, and the fireman, Meadows, members of the crew of No. 4. The flagman, Sinclair, disappeared; hence conductor Eubanks is the only member of the train crew who testified."

SPECIFICATION OF ERRORS.

1. The Supreme Court of Tennessee erred in announcing as a principle of law that in a suit based on the Federal Employers' Liability Act an injured employee could only assume the risk resulting from his own negligence and that such an one could not in any event assume the risk resulting from the negligence of a defendant and of his, the plaintiff's, fellow servants. (R., 246, 249, 251.)

2. The Supreme Court of Tennessee erred in holding it to be harmless error to leave it to a jury to determine the size of the verdict without the statutory limitation of "compensation," the jury being affirmatively limited only to "such pecuniary allowances therefor as in your opinion is warranted by the evidence. (R., 249-251.)

BRIEF OF ARGUMENT.

I.

The Supreme Court of Tennessee announced as the doctrine of assumption of risk under the Federal Employer's Liability Act a rule inconsistent with the decisions of this Court.

The Supreme Court of Tennessee, in its opinion in this case on the question of assumption of risk, said:

> "If the engineer (or his dependents) could be barred of recovery at all in this case on the assumed risk doctrine it would seem to be on the theory only that the engineer assumed the risk of his own negligence, or, expressing it differently, that he assumed the risk of his own violation of the rules of the company and his duty. But the Supreme Court of the United States has held that although an engineer was negligent in the violation of a rule, he was still entitled to recover under the Federal Act." (R., 246.)
>
> . . . . . .
>
> "The facts and circumstances speak for themselves, and the conclusion is irresisti-

ble, that the Railroad Company, or some officer, agent or employees of the Railroad Company, *other than or in addition to the engineer*, was guilty of negligence, proximately causing, in whole or in part, the death of the engineer." (R., 249.)

. . . . . .

"Third. Under the law and the evidence the engineer did not assume the risk." (R., 251.)

It will be noted that to support the statement quoted from page 246 the Supreme Court of Tennessee cited only *Spokane R. R. Co. v. Campbell*, 241 U. S. 497. In the Campbell case the doctrine of assumption of risk could not be successfully invoked by the carrier, because the cause of action was predicated upon *both the Federal Employers' Liability Act and the Safety Appliance Acts.*

In the case at bar, as aforesaid, the Safety Appliance Acts are not involved, and the cause of action is predicated alone upon the Federal Employers' Liability Act. (R., 16-20.)

That the Supreme Court of Tennessee announced an erroneous rule of law is obvious from

an inspection of the following decisions of this Court:

Seaboard Air Line v. Horton, 233 U. S. 492, 508.
Great Northern v. Wiles, Admr., 240 U. S. 444, 449.
Jacobs v. Southern R. R., 241 U. S. 229.
Chesapeake & Ohio R. R. v. DeAtley, 241 U. S. 310.
Boldt, Admx., v. Pennsylvania R. R. Co., 245 U. S. 441, 445.
Pryor v. Williams, 254 U. S. 43.

Since the filing of the petition for certiorari here, this Court has rendered a decision which is conclusive of the case at bar, to-wit: *Frese v. Chicago, Burlington & Quincy Railroad*, 44 Supreme Court Reporter 1.

In the Frese case, plaintiff predicated her cause of action upon the Federal Employers' Liability Act and claimed as a ground of negligence the failure of her intestate's fellow servants to observe or assist in the observance of an applicable statute of the State of Illinois regulating the movement of trains where the tracks of two carriers cross. In deciding in favor of the carrier, this Court said:

"Moreover the statutes make it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, *and it would be a perversion of the Employers' Liability Act* (April 22, 1908, c. 149, sec. 3; 35 Stat. 65, 66; Comp. St. sec. 8659) *to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.* See *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 448, 36 Sup. Ct. 406, 60 L. Ed. 732. If the engineer could not have recovered for an injury his administratrix cannot recover for his death. *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 70, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176." (Italics ours.)

In the case at bar, the deceased engineer was required under the rules and practices of the Railroad, with which he was entirely familiar, to bring the train to a complete stop at the end of the double track *unless he himself personally knew that the opposing superior train had passed.* (R., 61-62, 70, 77, 98-99, 116-117.)

It was a fact, as clearly shown by the record (R., 73-74), and as found by the Supreme Court of Tennessee (R., 249), that all the members of the train crew were supposed to lookout for the safety of the train. However, Kennedy, the deceased engineer, was obviously in a place where he could see sooner, better and more constantly than any one else. (R., 115.) It was broad daylight. There were no abnormal conditions. Kennedy had been told that his opposing superior train, Number One, had not arrived, and he was given a train order enabling him to unmistakably identify that train as and when it should pass his train, Number Four, on the double track. The only thing Kennedy had to do to protect himself and the train was to follow reasonable rules and established practices with which he was thoroughly familiar. (R., 98, 116-117.)

It was his absolute, non-delegable duty before leaving the double track to personally know that train Number One had passed. What others knew or might know never modified his obligation. (R., 98, 117.)

When he pulled out on to the single track beyond the shops, the danger of that act and the inevitable consequences were so open and obvious that any person in the exercise of ordinary care would have known and appreciated the danger that existed.

With his eyes open, with full knowledge of all the facts, in broad daylight, under no abnormal conditions, contrary to the rules and established practices, he deliberately drove his engine from the double track to the single track *without having ascertained whether his opposing superior train, Number One, had passed or not.* It is obvious that he is bound, as any reasonably intelligent person would have been under similar circumstances, to have known that a collision was imminent and inevitable.

It cannot now be successfully argued, as held in the Frese case *supra*, that his administratrix can recover "for an injury primarily due to his failure to act as required on the ground that *possibly the injury might have been prevented if his subordinate had done more.*"

We submit that two conclusions are obvious and inevitable.

First. The Supreme Court of Tennessee erred in holding that under the Federal Employers' Liability Act, the engineer could not assume the risk of the negligence of his employing carrier and of his fellow servants.

Second. Under the undisputed facts and under the statement thereof contained in the decision of the Supreme Court of Tennessee recovery cannot be had for Kennedy's death simply because some of his subordinates and associates might have prevented the accident if they had done more.

II.

The Supreme Court of Tennessee held that it was harmless error for the trial judge to leave the quantum of recovery to the opinion of the jury, unlimited by the standard fixed by the statute itself, namely, "compensation."

That portion of the trial judge's charge relating to the quantum of recovery under challenge constituted the fourth ground of the Director

General's assignment of errors in the Court of Civil Appeals (R., 195) and the first and only assignment of Mrs. Mary Kennedy, Administratrix, in the Supreme Court of Tennessee (R., 239), and is as follows:

> "But if you should find for the plaintiff, you should go further and assess the damages. In doing this you will take into consideration the deceased's earning capacity at the time of his death, and his reasonable expectancy based upon the evidence, also whether or not his earning capacity would or would not have been diminished by reason of advancing years. The jury may further consider the care, attention, advice and instruction which the evidence shows, if such be the case, that deceased reasonably might have been expected to give his minor children, and *make such pecuniary allowance therefor as in your opinion is warranted by the evidence.*"

The Court of Civil Appeals in a rather elaborate opinion sustained this assignment on the authority of *Railroad v. Witherspoon*, 112 Tenn. 128. (R., 209-211.) The Supreme Court of Tennessee conceded that this charge was erro-

neous, but concluded that the record did not clearly show that it was prejudicial error. (R., 249-251.)

We are not challenging the charge merely as being meager. On the contrary, the trial judge laid down a guide to the jury and that guide was wrong. Their award was not to be "compensation" as shown by the evidence, but "such pecuniary allowance therefor as in your opinion is warranted by the evidence."

Were this phase of the case to be controlled by the general principles of the common law as interpreted by the Supreme Court of the State of Tennessee, the case would have been reversed by that Court.

Railroad v. Witherspoon, 112 Tenn. 128, 137-139.
Insurance Co. v. Ayers, 88 Tenn. 728, 734.
Citizens' St. R. R. v. Shepherd, 107 Tenn. 444, 450.
Railway & Lt. Co. v. Dungey, 128 Tenn. 587, 596.
Jones v. State, 128 Tenn. 493, 498.
Memphis St. Ry. v. Carroll, 141 Tenn. 265, 269.

If, on the other hand, as we believe to be the case, this question is to be determined from a consideration of the Act itself and general principles of law as interpreted by the decisions of this Court, the trial judge's charge was both erroneous and prejudicial.

Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485, 491.
New Orleans & N. E. R. R. v. Harris, 247 U. S. 367, 371-372.

Whatever is of substance, as is the measure or standard of recovery, depends entirely upon the Federal law.

Central Vermont Ry. v. White, 238 U. S. 507, 511-512.
Pryor v. Williams, 254 U. S. 43, 46.

Compensation is the standard and the limit of recovery. Instructions as to the measure of damages must affirmatively limit the quantum of recovery by the use of the word "compensation," or some word or phrase of similar meaning.

In *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 69, 70, 72, this Court held that the pecuniary loss to which a plaintiff was entitled under the Federal Employers' Liability Act must

be measured "by some standard" and that the standard was "compensation."

Further, a charge similar in substance to that now under attack was condemned by this Court, saying:

> "This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." (73.)
>
> . . . . . .
>
> "They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions." (74.)

In *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U. S. 485, 489, this Court said:

> "The damages should be *equivalent to compensation* for the deprivation of the reasonable expectancy of pecuniary benefits that would have resulted from the continued life of the deceased."

See also *New York Central v. Winfield*, 244 U. S. 147, 149.

Where a charge is erroneous, prejudice is presumed.

In *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 82, this Court said:

> "And of course in jury trials erroneous rules are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

In *Boyd v. State*, 84 Tenn. 149, 154-155, the Court said:

> "It is very earnestly insisted, however, that conceding the instructions as erroneous, it could, in view of the evidence in the record, have worked no injury to the defendant, and consequently there should be no reversal of the cause on account of it. As it is said, if the jury believed this evidence on part of the defendant was false and procured by the defendant, and that the witnesses adduced by the State as to this matter were credible, they would, necessarily, under proper instructions, have found the

facts as testified to by them. It is a sufficient answer to this to say, that it was the peculiar province of the jury to determine this fact from the evidence, and it could not be taken away from them without a violation of the rights of the defendant. The fact was material, and this Court has often said, that to entitle the defendant to a reversal *it is not necessary that we shall see that the defendant must have been injured by the error complained of, but it is sufficient if he might have been injured by it.*" (Italics ours.)

There can be no presumption that there will be the same result when the law is followed and when the law is not followed.

Louisville & N. R. R. v. Greene, 244 U. S. 522, 554.

See also

Jones v. State, 128 Tenn. 493, 498.

Railway & Lt. Co. v. Dungey, 128 Tenn. 587, 596.

Lowry v. Railroad, 117 Tenn, 507, 514-520.

Where a case comes here from a state court "this Court will, for the purpose of determin-

ing whether the error found may have been prejudicial, examine the whole record. . . ." Further, the record must "convince us that the admitted error was harmless. . . ."

Yazoo & M. V. R. R. Co. v. Mullins, 249 U. S. 531, 533.
Davis v. Wechsler, 44 S. C. R. 13 (decided Oct. 22, 1923).

Respondent (page 17 of reply to our petition for certiorari) relies on *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255. On pages 259 and 260 this Court said:

> "But mere error without more is not enough to upset the judgment, if the record discloses that no injury *could have resulted therefrom. West v. Camden*, 135 U. S. 507, 521." (Italics ours.)
>
> . . . . . .
>
> "In effect the charge was more favorable to the petitioner than it could have demanded, and we think no damage could have resulted from the erroneous theory adopted by the trial court."

Where instructions are more favorable than the law permits the party so favored cannot com-

plain because "no injury could have resulted therefrom." In the case at bar the admitted error was not "more favorable" but less favorable than the law, and injury certainly "could have resulted therefrom."

Both Tennessee Courts held that the charge in question was erroneous. The Supreme Court of Tennessee did not believe that the record affirmatively showed that the error was prejudicial. As aforesaid, prejudice is presumed from error. Those who claim the error to be innocuous must point out wherein it is clear that no harm was done. A consideration of this record, as this Court may do under the Mullins case *supra*, would seem to be conclusive that there is no real basis for the pure assumption that this admitted error was innocuous.

The undisputed facts clearly show that the error was prejudicial.

(a) The deceased Kennedy was 73 years of age when he died. (R., 24, 151-153.) This Court will take judicial cognizance of the fact that a man 73 years of age could not long continue to act as a locomotive engineer; hence un-

der normal conditions, the deceased would have shortly ceased his large earnings as a locomotive engineer.

(b) Further, the deceased Kennedy, under no unusual or abnormal conditions, violated the custom and practice with which he was thoroughly familiar, and his orders, hence was guilty of the grossest negligence. (R., 59-60, 69-70, 77, 113-117, 121-123, 141.) The principle that the violation of a reasonable rule is negligence *per se* is general. *Lake Erie & W. R. Co. v. Craig*, 80 Fed. 488, 495, decided by Circuit Judges Taft and Lurton and District Judge Clark; *American Zinc Co. v. Smith*, 128 Tenn. 447, 454-455.

Assuming that one or more of Kennedy's fellow servants were guilty of negligence, still it is obvious that Kennedy's negligence was so great in comparison to that of all others as to make a substantial recovery contrary to the decisions of this Court. A jury must (not may) diminish full compensation proportionately as the negligence of the plaintiff or plaintiff's intestate bears to the entire negligence attributable to all parties.

Norfolk & Western v. Earnest, 229 U. S. 114, 120, 122.
Illinois Central v. Skaggs, 240 U. S. 66, 70.
New York Central v. Winfield, 244 U. S. 147, 151.

Kennedy's fellow servants, except the fireman, were inside and in the rear of a vestibuled train, performing the various duties imposed upon them. The train was going up grade, and in the absence of evidence it is natural to presume that the fireman (who was killed) was shoveling coal. Kennedy was on the lookout ahead where he could see constantly and accurately. *He could see sooner, better and more continuously than any other person.* His fellow servants' ability to ascertain the approach and passage of train Number One, due to physical limitations, was not fairly comparable with his own; hence we submit that of the total negligence of all parties, that properly attributable to him was so great as to make any substantial recovery legally impossible.

(c) The deceased Kennedy was survived by a widow 56 years of age and two daughters who

had reached their majority, and one son 17 years of age. (R., 23-25.) After Kennedy's death his widow on his account continued to receive from the Government of the United States a pension of $30.00 per month. (R., 162.) In view of these facts, it would seem that the Supreme Court of Tennessee could not properly assume that this admittedly erroneous charge was harmless.

With these undisputed facts in mind, no Court can, we think, assume the burden of saying that the jury would have rendered a verdict of the same size whether the measure of damages given them for their guidance by the trial judge was right or wrong. A litigant has the right to go to trial with the law on the vital issues correctly charged. Of course, no issue is more vital than the measure of damages. There must be some standard and the "standard," as this Court said in the Vreeland case, is "compensation." Possibly the word "compensation" might properly be omitted if its legal equivalent is used. In the case at bar, however, the trial judge not only did not limit the award of the jury to compensation, but he used no word, no phrase, no expression, of the same or similar meaning, but,

on the contrary, he expressly gave them another and different limitation—namely, "such pecuniary allowance therefor as in your opinion is warranted by the evidence."

Respondent, Mrs. Mary Kennedy (page 15 of reply to petition for certiorari), contends that such limitation is not necessary, and cites *Chesapeake & Ohio Ry. Co. v. Carnahan*, 241 U. S. 241, 243, to sustain that conclusion. There is nothing in that case that militates in any way against our contentions here. Only the second assignment of error, which is discussed on pages 243-245, is pertinent to our case. The objection to the instruction of the Court was that it "allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000 and allowed the jury to give such sum as damages as to them 'might seem just and fair,' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of." (P. 244.)

The objection of counsel as shown by their own language was not that the trial judge did not limit the recovery to *compensation*, but that he

did not limit them to the amount "proved by the evidence to have proximately resulted from the negligent act complained of," and this was the point this Court decided. The question now before the Court was neither raised nor discussed.

Our jury system is predicated upon the belief that a jury will intelligently apply the law as given them by the Court to the facts as they find them from the evidence. To assume that the same result will be reached whether the instructions of a Court are right or wrong, is to deny the efficacy of and ultimately destroy the jury system.

There are, of course, many instances of innocuous error, but the instant case is not one of that character. A rule to guide the jury was given and that rule was inaccurate. The result naturally was wrong.

In a case predicated on a Federal statute, such as the Federal Employers' Liability Act, a defendant has the right to a trial before a jury wherein the measure of its liability is correctly stated. We claim that the word "compensation"

or some word or phrase of the same or similar import should have been used and that the failure so to do constituted prejudicial error. The charge under attack is not challenged for mere meagerness—an error of omission. On the contrary, the trial judge laid down a rule—a yardstick—and that rule was wrong. In the light of the facts above set out, it is not sufficient to say that the jury might have reached the same conclusion even if the law had been correctly given them. The carrier was or "might have been injured by it." This justifies a reversal. *Boyd v. State*, 84 Tenn. 149, 155.

We respectfully submit that this case should be reversed.

Respectfully submitted,

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No. 371

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, AGENT,
PETITIONER,

versus

MRS. MARY KENNEDY, ADMINISTRATRIX,
RESPONDENT,

REPLY TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petition for writ of certiorari in this case should not be granted:

I.

The first specification of error is that the Supreme Court of Tennessee announced that under the Federal Employers' Liability Act, an employee could not assume the risk of negligence of the defendant or of his fellow servants. (Petition, 8, 23, R., 246).*

*Page references refer to top paging of printed record.

Petitioner asks no review of the facts found by the Supreme Court of Tennessee. From the statement of that court, as well as by the finding of the jury approved by the trial court and the intermediate court, it appears that the conductor, flagman and fireman violated the rules of the Company and their duty and were negligent in permitting No. 4 to go on the single track without *knowing* that No. 1 had passed. (R., 249, 244, 242, 122, 121, 119, 111, 110, 52).

The Supreme Court of Tennessee found that the defendant had recognized that *all* of the crew had other duties to perform ~~other~~ than to look out for No. 1 and hence as a wise precaution placed that duty upon *each member* in order to avoid a *mistake*. (R., 242).

If any of these other three members of the crew had not been negligent, they could have angle-cocked, thereby stopping the train themselves, or pulled the train down, thereby notifying the engineer to stop same, as same ran one mile and a half after getting out on the single track. (R., 207, 99, 52).

So then, *it is now undisputed that three other employees of the defendant were negligent.*

The most of petitioner's argument as to prejudice suffered under this specification is that "the danger of running No. 4 out on the main track before No. 1 had passed was so open and obvious and the result so certain that respondent's intestate assumed the risk of the danger resulting from the admitted negligence of the other employees in failing to observe that No.

1 had not passed and to warn him" or (we say) to angle-cock the train. (Petition, 28).

This statement presupposes that Kennedy *deliberately* and intentionally ran his train out on this single track when he *knew* (not simply should have known) that the incoming train with superior rights was then due. This Court has said, in a similar case, that however plain such a mistake might be "the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or compehend the order communicated to him." (*Spokkane & I. E. R. Co.,* v. *Campbell,* 241 U. S., 497, 508).

Petitioner's view *totally disregards* the effect of the finding of the jury and two State Appellate Courts and overlooks the rules that the burden of proving contributory negligence rests upon the defendant (*Burke* v. *Street Railway Co.,* 102 Tenn., 409) and that where there is no direct proof of what happened (there being no direct proof here as to what happened in the cab of the engine after the train left the Union Station), the jury has a right to even find ordinary care in accordance with the presumption of the instinct of self-preservation having been obeyed by the deceased (*Railway Company* v. *Herb,* 134 Tenn., 397.)

It must be remembered that the only negligent act the petitioner charges against respondent's intestate is that of running out on the single track without

knowing No. 1 had passed. It has never been contended that after the engineer got upon the single track that he could have seen No. 1 (at the place of the wreck) in time to have stopped and avoided a collision because it is undisputed he was just coming out of a deep cut, on a curve and where No. 1 would be so close before it could be observed that the trains could not be stopped in time at the speed they were travelling. (R., 143, 130, 129, 125, 107, and photographs filed with Jones' testimony).

An engineer has other duties to discharge than keeping a vigilant lookout ahead and it follows that the question of his contributory negligence in failing to keep such vigilant lookout is one of fact for the jury.

Central Railroad & Banking Co., v. *Kent*, 87 Ga., 402;
L. & N. Railroad v. *Hutt*, 101 Ala., 34;
Hall v. *Railway Co.*, 46 Minn., 439.

In the Literary Digest of February 14, 1920, page 86, there appeared an article in regard to a fireman stopping an express on the Philadelphia & Reading when the engineer was struck by some object while looking out of the window and became unconscious. Kennedy was an old and experienced engineer and such a thing may or may not have happened here; or, while performing some other duty, he may have explicitly depended upon his fireman to look out for No. 1. He had other engrossing duties to perform. (R., 242, 120).

Momentary forgetfulness of a known danger is not, as a matter of law, such negligence as will even, at common law, bar a recovery. See *Knoxville* v. *Cox,* 103 Tenn., 68.

Whether Kennedy was negligent or not is not the point as these other employees were negligent so that, under the Federal Statute, Kennedy's act not being the sole cause of the accident, there can be a recovery.

Grand Trunk W. R. Co., v. *Lindsay,* 233 U. S., 42, 47;

Illinois Central Railway Co., v. *Skaggs,* 240 U. S., 66, 69, 70;

Union Pacific Railroad Co., v. *Hadley, Admr.,* 246 U. S., 330, 333;

Pennsylvania Co., v. *Cole,* 214 Fed., 948;

Railroad Co., v. *Heinig's Admrx.,* (Ky.), 171 S. W., 852.

The facts in the Heinig case were quite similar to those in the- case at bar (except here more co-employees were at fault) and the reasoning of the Kentucky Court, based upon decisions of this and other Federal Courts, is unanswerable.

Or, to conform to the holding in the last three cases, *supra,* the rule might be stated in another way to be that where the accident would not have happened if another employee or employees had done his or their duty, a recovery can be had.

Indeed, under the rule of comparative negligence established by the Liability Act, no degree of negligence, however gross or proximate, on the part of a

servant (short of his act being the sole cause) will bar a recovery and the employer will be liable if any other employee or employees is guilty of any causative negligence, no matter how slight the negligence is in comparison to the negligence of the injured employee.

Pennsylvania Co. v. *Cole,* 214 Fed. 948;
N. Y. C. & St. L. R. Co., v. *Niebel,* (C. C. A. 1914), 214 Fed., 952.

The petitioner cannot avoid this rule of law by stating there was an "assumption of risk" any more than the defendant in the Lindsay case could nullify the terms of the statute by calling the plaintiff's act "the proximate cause."

The person whose "want of care," together with the danger flowing therefrom, must be known and appreciated under the above rule is that of the employer or co-employees of the injured party, *not that of the injured party himself.* That is the vice in petitioner's argument on his first specification of error, which is devoted *solely* to a discussion of Kennedy's negligence. (Petition, 24-30).

While under the Employers' Liability Act, negligence of co-employees may be an assumed risk, yet this is only where the negligence was, in fact, known to the plaintiff or was so customary that he must be charged with knowledge and, also, plaintiff must appreciate the danger.

Michigan, Etc., Railway Co., v. *Schaffer,* (C. C. A., 6th Circuit), 220 Fed. 809, 813;

C. & O. R. Co., v. *De Atley,* 241 U. S., 310, 315;

C., R. I. & P. Co., v. *Ward,* 252 U. S., 18, 21-22.

Petitioner cites no proof, and there is no proof, showing, or tending to show, that Kennery had *any reason* to know or believe that the flagman and the fireman would not, on this trip, look out for No. 1 and warn him or angle-cock the train if need be, nor that they had *ever* failed to look out for No. 1.

The only testimory intimating any possible knowledge by the engineer that any member of the crew might, at any time, not have been on the lookout for No. 1 appears in the cross-examination of Eubanks, the conductor (who was in the employ of the petitioner at its shops and being the only accessible surviving member of the crew was called by the respondent as a witness) (R., 65). Eubanks' answers to petitioner's questions were evidently not satisfactory as the matter was not pursued, so that the record was there left in imperfect shape on this point and the testimony is somewhat ambiguous and uncertain. But a fair inference therefrom is that on one or more occasions, *previous* to this occasion, Eubanks had specifically requested Kennedy to look out for No. 1 for him 'that morning,' that there was no regular custom of this kind however and that as the conductor did not make this specific request on other mornings, including the morning in question, Kennedy had the right to believe that Eubanks did not expect him on this morning to look out for him and,

hence, he did not assume the risk of the conductor's negligence. This issue was squarely, under correct instruction not now complained of, submitted to the jury (R., 186) and the jury, by its verdict (R., 2), found against the petitioner.

Under both the Federal and State rule, this settled the question of fact.

Richmond & Danville R. R. Co., v. *Powers*, 149 U. S., 43, 45;

Rapid Transit Co., v. *Seigrist*, 96 Tenn., 119, 124-125.

Indeed, that the jury should have found that Kennedy had no reason to believe that Eubanks or any other member of the crew would fail to look out for No. 1 that morning and hence did not assume any risk of their not doing so, is seen from Eubanks' clarification, on re-direct examination, of his former uncertain and ambiguous testimony when he said in regard to the custom as to looking out for passage of trains, etc., when his train was crowded:

> "I think it is the custom for *us all* to look out when we are crowded that way, for any member of the crew." (R. 73).

The Court of Civil Appeals, in affirming on this issue, appreciated the correct rule, under the Liability Act, on the assumption of risk of negligence of fellow servants. (R., 208).

Under the facts, the Supreme Court of Tennessee was correct in stating that both under the law and

the *evidence,* the engineer did not assume the risk. (R., 251).

In view of the above, it is immaterial whether or not language used by the Judge who delivered the opinion of the Supreme Court of Tennessee in another portion of the opinion properly bears the construction contended for by petitioner, *i.e.* that the doctrine of assumption of risk is abolished by the Employers' Liability Act, because such a situation is ruled by the case of *St. Louis & San Francisco Railroad Co.,* v. *Brown,* 241 U. S., 223, 227-8, in which this Court *declined to reverse on writ of error* the Supreme Court of Oklahoma in an Employers' Liability case where that Court flatly announced that the doctrine of assumption of risk had been abolished. However, the question of fact had been submitted to the jury in a trial court under charge not here complained of and this Court said:

> "At best, therefore the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of reversing the judgment *although no reversible error exists.*"

See also *Seaboard Air Line Railway* v. *Moore,* 228 U. S., 433, 435, where the Circuit Court of Appeals for the Fifth Circuit was seemingly guilty of the same inadvertent statement.

The quotation from the Brown case squarely fits

petitioner's first specification of error and, hence, this Court will disregard same.

II.

The second specification of error is that the Supreme Court of Tennessee erred in holding that it was harmless error for the trial court to omit the word "compensation" in charging the jury as to damages. A consideration of this naturally subdivides itself into two heads: (A) Was this holding erroneous, and (B) If so, should writ of certiorari issue?

A.

The trial court, after reciting the proper facts to be considered by the jury in assessing the damages, instructed them "to make such pecuniary allowance therefor as in your opinion is warranted by the evidence. In no event should your verdict exceed the amount sued for in the declaration." (R., 185, 195-6, 249).

The objection thereto, taken when motion for new trial was filed, was simply that the jury were nowhere limited to "compensation." (R., 196). So that if the jury had been instructed at the conclusion "to give such compensation therefor as, in your opinion, is warranted by the evidence" or "to allow compensation therefor in such amount as is warranted by the evidence," there would have been no objection and yet, what difference is there in the sense of these several statements and in the understanding that the jury would have thereof?

The Supreme Court of Tennessee (R., 250-251) did not state whether the Federal or State law should control in measuring this question but held that this charge did not prejudice the defendants, and "while not strictly correct, there was *no evidence* in the record which tended to show that the verdict was in excess of the pecuniary loss sustained by the beneficiaries" and that the jury were well warranted in awarding that amount.

As to whether or not, in such a situation, the Appellate Court should reverse was a question of practice. Clearly, under the State rule, the Supreme Court committed no error in not reversing.

Thompson-Shannon's Code, § 4902a-1;
Acts of 1911, chap. 32;
Compress Co., v. *Insurance Co.,* 129 Tenn., 586, 597.

This statute reads (in the relevant part) "No verdict or judgment shall be set aside or new trial granted by any of the appellate courts of this state, in any civil or criminal cause, on the grounds of error in the charge of the judge to the jury * * * unless, in the opinion of the appellate court to which application is made after an examination of the entire record in the cause, it shall *affirmatively appear* that the error complained of has affected the results of the trial."

Under the Federal practice, an exception to any portion of the charge must be specific and is of no avail unless taken before the jury retires (*Pacific*

Express Co., v. *Malin,* 132 U. S., 531, 538) and the reason for this is, of course, that the trial judge may then and there consider the exception and have an opportunity to give new and different instructions if he should then deem it proper to do so. Under the Tennessee practice, there is no exception taken until the motion for new trial is made, after the jury has brought in its verdict. Hence, it is quite fitting that the rule announced by the Act of 1911 should prevail for, if parties are permitted to wait until some time after the verdict to go over the record and then critically examine same for exceptions, without any opportunity for the trial judge to have set himself right before the jury as that trial, the complaining party should be forced to show that he was, in fact, prejudiced.

The *practice* in an action in a State court under the Federal Employers' Liability Act is regulated by the law of the forum.

> *Chesapeake & Ohio Railway Co.,* v. *De Atley,* 241 U. S., 310, 317.

This we believe fully answers the second specification of error but to go further, we may say the question of proper measure of damages is inseparably connected with the right of action and must be settled by the Federal law.

> *Chesapeake & Ohio Railway Co.,* v. *Kelly,* 241 U. S., 485, 491.

A reading of charges approved by the Federal and many other courts shows that the use of the word

"compensation" is not necessary, but the Court can use any appropriate language conveying the idea of making pecuniary allowance warranted by the evidence for the damages or injury *flowing* or *resulting* from the negligence of the defendant.

Chesapeake & Ohio Railway Co., v. *Carnahan*, 241 U. S., 241, 243;
Southern Pacific Co., v. *Cavin*, 144 Fed., 348, 75 C. C. A., 350;
Railway v. *Otto*, 52 Ill., 416;
Munro v. *Pacific Coast, Etc., Co.*, 84 Cal. 515.

In the Carnahan case, the trial court, on the measure of damages, instructed the jury as follows:

> "The Court instructs the jury that if they believe from a preponderance of the evidence that defendant is liable to plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, *as to them may seem just and fair.*"

It is to be noted that this instruction apparently gave the jury more latitude, by its verbiage, than did the instruction complained of in the instant case. This court, in affirming, held that this instruction was not objectionable as leaving the amount of damages to conjecture without regard to the evidence, where the Court explicitly enjoined upon the jury

that there must be a proximate and causal relation between the damages or injuries and the defendant's negligence.

In the instant case, the lower court repeated several times the language of the Act that the injuries or death must have *resulted,* in whole or in part, from negligence of the carrier; that said negligence, in whole or in part, must have been the cause of the injury and death of David Kennedy before the plaintiff could recover (R., 184, 185) and at the request of the defendants explicitly charged:

> "I charge you that an injury which is the natural and probable result of the act of negligence is actionable and (when?) such act is the proximate cause of the injury."
> R., 186.

The question of liability being determined, the damages or injuries to plaintiff arose solely from the death and the elements were properly stated and her damages were expressly limited to those "warranted by the evidence" and the charge was not erroneous, particularly, in the absence of request for further instructions.

The Tennessee case of *Railroad* v. *Witherspoon,* 112 Tenn., 128, which reversed the lower court for failure to use the word "compensation" in the charge, has been considerably limited by the decision of the Court of Appeals in *Telephone Co.,* v. *Carter,* 1 Tenn., C. C. A., 750, 771-7, (writ of certiorari denied by the Supreme Court of Tennessee) which sus-

tained a charge where the word "compensation" was not used.

But even if the Federal rule as to *practice* prevails and the strict State rule requiring the use of the exact word "compensation" governed, yet we must remember that the Federal rule of practice is that any error is not sufficient for reversal if the record discloses no injury resulted therefrom.

West v. *Camden,* 135 U. S., 507;
Carlisle Packing Co., v. *Sandanger,* 259 U. S., 255, 259.

And here the Tennessee Supreme Court found that not only "was the verdict not in excess of the pecuniary loss sustained but also the evidence tended strongly to show that the beneficiaries sustained *at least* this pecuniary loss and the jury was well warranted in finding this amount." The Supreme Court was entirely correct in this statement as the *undisputed* evidence showed that the decedent was earning $3,000.00 a year, was an extraordinarily vigorous man for his age, had never been sick, his expectancy of life was quite great, his family consisting of a wife (stone deaf), two daughters and a son, received practically all he made and he was greatly interested in and gave the best care and advice to, his family. (R., 81, 78, 106, 118, 180, 24, 25, 26).

The Carlisle Table (R., 180) shows average expectancy at this age to be 8.16 years and with Kennedy's extraordinary vigor he would have probably lived 11 or 12 years longer.

The Supreme Court of Tennessee, by refusing issuance of writ of certiorari in the case of *International Corporation* v. *Wood,* 8 Tenn., C. C. A., 10, 28, has heretofore adopted the rule that there should be no reversal for an erroneous instuction as to damages where it was apparent that no more than fair compensation was awarded and, it may be said, the Wood case was a personal injury case.

B.

The writ of certiorari provided for under § 237 of the Judicial Code, as amended September 6, 1916 (Chap. 448, 39 Stat. at L. 726, Comp. Stat. 1916, Section 1214) is not a writ of right but is granted or refused in the exercise of a sound discretion.

Philadelphia & Reading Coal & Iron Co., v. *Gilbert,* 245 U. S., 162, 165.

And in regard to this same writ, issued under Section 240 of the Judicial Code to Circuit Courts of Appeal, this Court, in the recent case of *Layne & Bowler Corporation* v. *Western Well Works,* 67 L. ed. 497, 499, stated that, so as not to add to an already burdened docket,

> " . . . .it is *very important* that we be consistent in not granting the writ of certiorari except in cases involving principles the setlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

The opinion of the Supreme Court in this case was not for publication, there is no principle involved the settlement of which is of importance to the public, but simply a question of local Tennessee practice as to when an Appellate Court will reverse for error and this, in a case, where the Supreme Court finds that the damages allowed were no more than fair compensation. This accident happened over five years ago (R., 17) and we do not believe the writ would issue to order a reversal where the respondent is entitled to a substantial verdict and upon a second trial, if a jury rendered a similar verdict, they would give no more than an Appellate Court thought proper, which was an amount less than the total of three years earnings of the deceased.

It is respectfully requested on behalf of Mrs. Mary Kennedy, Administratrix, that the petition as prayed be denied.

Respectfully submitted,

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W. E. NORVELL, JR.,
Of Counsel

[redacted]

[redacted]

JAMES G. DAVIS, AGENT,

Petitioner,

versus

MRS. MARY KENNEDY, ADMINISTRATRIX,

Respondent.

REPLY BRIEF FOR RESPONDENT

October, 1928

W. R. NORVELL Jr.
Counsel for Respondent

[redacted]

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No. 371

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, AGENT,
PETITIONER,

versus

MRS. MARY KENNEDY, ADMINISTRATRIX,
RESPONDENT,

REPLY BRIEF FOR RESPONDENT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

FIRST SPECIFICATION OF ERROR.

The first specification of error is that the Supreme Court of Tennessee announced that under the Federal Employers' Liability Act, an employee could not assume the risk of negligence of the defendant or of his fellow servants. (Petition, 8, 23, R., 246).*

*Page references refer to top paging of printed record.

Other Employees of Petitioner were Guilty of Proximate Negligence.

Petitioner asks no review of the facts found by the Supreme Court of Tennessee. From the statement of that court, as well as by the finding of the jury approved by the trial court and the intermediate court, it appears that the conductor, flagman and fireman violated the rules of the company and their duty and were negligent in permitting No. 4 to go on the single track without *knowing* that No. 1 had passed. (R., 249, 244, 242, 122, 121, 119, 111, 110, 52.)

The Supreme Court of Tennessee found that the defendant had recognized that *all* of the crew had duties to perform other than to look out for No. 1 and hence as a wise precaution placed that duty upon *each member* in order to avoid a *mistake.* (R., 242.)

It further expressly found, supported by the evidence, that if the engineer was negligent in not *knowing* No. 1 had not passed, *"the other members of the crew were necessarily negligent for the same reason."* (R., 249.) The Tennessee Court of Civil Appeals also found the jury was warranted in finding the operator or signalman at the shops or commencement of the single track to have been negligent in permitting the train to proceed onto this track. (R., 204-5.)

If any of these other three members of the crew had not been negligent, they could have angle-cocked, thereby stopping the train themselves, or pulled the train down, thereby notifying the engineer to stop

same, as same ran one mile and a half after getting out on the single track. (R., 207, 99, 52.)

So then, *it is now undisputed that at least three, if not four, other employees of the defendant were negligent.*

The most of the argument in the petition as to prejudice suffered under this specification is that "the danger of running No. 4 out on the main track before No. 1 had passed was so open and obvious and the result so certain that respondent's intestate assumed the risk of the danger resulting from the admitted negligence of the other employees in failing to observe that No. 1 had not passed and to warn him" or (we say) to angle-cock the train. (Petition, 28).

This statement presupposes that Kennedy *deliberately* and intentionally ran his train out on this single track when he *knew* (not simply should have known) that the incoming train with superior rights was then due. This Court has said, in a similar case, that however plain such a mistake might be "the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him." (*Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S., 497, 508).

Petitioner's view *totally disregards* the effect of the finding of the jury and two State Appellate Courts and overlooks the rules that the burden of proving contributory negligence rests upon the de-

fendant (*Burke* v. *Street Railway Co.*, 102 Tenn., 409) and that where there is no direct proof of what happened (there being no direct proof here as to what happened in the cab of the engine after the train left the Union Station), the jury has a right to even find ordinary care in accordance with the presumption of the instinct of self-preservation having been obeyed by the deceased (*Railway Company* v. *Herb*, 134 Tenn., 397.)

It must be remembered that the only negligent act the petitioner charges against respondent's intestate is that of running out on the single track without knowing No. 1 had passed. It has never been contended that after the engineer got upon the single track that he could have seen No. 1 (at the place of the wreck, in time to have stopped and avoided a collision because it is undisputed he was just coming out of a deep cut, on a curve and where No. 1 would be so close before it could be observed that the trains could not be stopped in time at the speed they were travelling. (R., 143, 130, 129, 125, 107, and photographs filed with Jones' testimony).

An engineer has other duties to discharge than keeping a vigilant lookout ahead and it follows that the question of his contributory negligence in failing to keep such vigilant lookout is one of fact for the jury.

Central Railroad & Banking Co., v. *Kent*, 87 Ga., 402;

L. & N. Railroad v. *Hutt,* 101 Ala., 34;
Hall v. *Railway Co.,* 46 Minn., 439.

In the Literary Digest of February 14, 1920, page 86, there appeared an article in regard to a fireman stopping an express on the Philadelphia & Reading when the engineer was struck by some object while looking out of the window and became unconscious. Kennedy was an old and experienced engineer and such a thing may or may not have happened here; or, while performing some other duty, he may have explicitly depended upon his fireman to look out for No. 1. He had other engrossing duties to perform. (R., 242, 120).

Momentary forgetfulness of a known danger is not, as a matter of law, such negligence as will even, at common law, bar a recovery. See *Knoxville* v. *Cox,* 103 Tenn., 68.

Whether Kennedy was negligent or not is not the point as these other employees were negligent so that, under the Federal Statute, Kennedy's act not being the *sole cause* of the accident, there can be a recovery.

Grand Trunk W. R. Co., v. *Lindsay,* 233 U. S., 42, 47;

Illinois Central Railway Co. v. *Skaggs,* 240 U.S., 66, 69, 70;

Union Pacific Railroad Co. v. *Hadley, Admr.,* 246 U. S., 330, 333;

Pennsylvania Co. v. *Cole,* (C. C. A. 6th Ct.) 214 Fed., 948.

Railroad Co. v. *Heinig's Admrx.*, (Ky.) 171 S. W., 852;

Copeland v. *Hines* (C. C. A. 6th Ct.), 269 Fed., 361.

The facts in the Heinig case were quite similar to those in the case at bar (except here more co-employees were at fault) and the reasoning of the Kentucky Court, based upon decisions of this and other Federal Courts, is unanswerable.

Or, to conform to the holding in the last three cases, *supra*, the rule might be stated in another way to be that where the accident would not have happened if another employee or employees had done his or their duty, a recovery can be had.

Indeed, under the rule of comparative negligence established by the Liability Act, no degree of negligence, however gross or proximate, on the part of a servant (short of his act being *the sole cause*) will bar a recovery and the employer will be liable if any other employee or employees is guilty of any causative negligence, no matter how slight the negligence is in comparison to the negligence of the injured employee.

Pennsylvania Co. v. *Cole*, 214 Fed. 948;
N. Y. C. & St. L. R. Co. v. *Niebel*, (C. C. A. 1914), 214 Fed., 952.

The petitioner cannot avoid this rule of law by stating there was an "assumption of risk" any more than the defendant in the Lindsay case could nullify the

terms of the statute by calling the plaintiff's act "the proximate cause" (233 U. S. 47).

The person whose "want of care," together with the danger flowing therefrom, must be known and appreciated under the above rule is that of the employer or co-employees of the injured party, *not that of the injured party himself*. That is the vice in the argument in the petition on the first specification of error, which is devoted solely to a discussion of Kennedy's negligence (Petition, 24-30) and in the brief which is *devoted almost entirely* to the same point (Petitioner's brief, 15-18).

Petitioner confounds doctrine of contributory negligence of claimant (or here, deceased) with doctrine of assumption of risk and it states and cites no facts showng or relating to assumption of risk.

For instance, on page 18 of petitioner's brief, it is said:

> "When he (Kennedy) pulled out to the single track beyond the shops, the danger of that act and the inevitable consequences was so open and obvious that any person in the exercise of ordinary care would have known and appreciated the danger that existed."

As there was no allegation or contention of negligence as to the location or arrangement of tracks, or as to the operation of train No. 1, this is *only* a contention that Kennedy was negligent and that his negligence was *the sole cause of the accident*. Petitioner overlooks the distinction between negligence or con-

tributory *negligence* of the employee and his *assumption of risk* of the negligence of the employer or his fellow employees and has disregarded the warning as to avoidance of this confusion given by this court in the case of *Seaboard Air Line Ry.* v. *Horton,* 233 U. S., 492, 503-4.

In line with this same argument, petitioner cites, and quotes from, the recent case of *Frese* v. *C. B. & Q. Railroad,* 44 Sup. Ct. Rep. 1, (Petitioner's brief, 15-16, 18) and says, in this connection, that it was 'his (Kennedy's) *absolute, non-delegable duty* before leaving the double track to personally know that train No. One had passed and what others knew or might know never modified his obligation' (Petitioner's brief, 17). To this reliance upon the Frese case, we say that *said case is not applicable to the case at bar and is easily distinguishable therefrom* and, to this whole line of argument of Kennedy's negligence being the *sole cause of the accident,* we say that *petitioner made no such specification of error and this court will not, therefore, consider this point.*

Frese Case is not Applicable to the Case at Bar and is Easily Distinguishable Therefrom.

In the Frese case, the statute laid the duty *solely* upon the engineer of *positively* ascertaining that the crossing was clear or the draw bridge closed. (44 Sup. Ct. Rep. 2; U. S. S. C. Adv. Opinions Nov. 1, 1923, 1-2). No duty was laid upon the fireman and this Court rejected the idea that Frese's administratrix could recover simply because the fireman, *upon whom*

no duty was laid, might, perhaps, have seen the other train and caused the accident to be avoided.

In the case at bar, the duty of looking out for No. One was not laid SOLELY upon the engineer but upon ALL *the members of the train crew alike.* (R., 242, Petitioner's statement of case, 7).

> *This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman.* All of these men obviously had other duties to perform."

This case is, therefore, not governed by the Frese case but by the cases of *Union Pacific Railroad Co.* v. *Hadley, Admr.,* 246 U. S., 330, 333; *Pennsylvania Co.* v. *Cole,* (C. C. A. 6th Circuit) 214 Fed., 948; *Copeland* v. *Hines,* (C. C. A. 6th Circuit) 269 Fed., 361, etc.

The Frese case cites and is bottomed upon the case of *Great Northern R. Co.* v. *Wiles,* 240 U. S., 444. The Hadley case, where if the deceased brakeman had not violated his *non-delegable duty* of protecting the rear of his train, he would not have been killed, distinguishes the Wiles case, *from this line of cases where others violated duties,* saying in that case "it appeared that the *only negligence* connected with the death was that of the brakeman who was killed" (246 U. S., 333). In response to the argument of the railroad that the brakeman's negligence in the Hadley case was the *only proximate cause,* the same argu-

ment here made by petitioner, this Court said (246 U. S., 333):

> "But even if Cradit's negligence should be deemed the logical last, *it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees of the road.'*"

In this connection, it must not be forgotten that, as shown, *all the other members of the crew* were likewise negligent in not knowing that No. One had not passed and in, therefore, not angle-cocking or otherwise stopping the train.

Failure to prevent an accident or injury is an efficient and proximate cause.

Deming v. *Merchants Cotton-Press Co.*, 90 Tenn., 306, 353;

Postal Telegraph Cable Co. v. *Zopfi*, 93 Tenn., 369.

The Petitioner not Having Assigned as Error that Kennedy's Negligence was, Under the Law, the Sole Cause of the Accident, this Court will not Consider that Point.

The petitioner, in the Supreme Court of Tennessee, in addition to some complaint about alleged errors in charge of trial court, specified and assigned as errors committed by the Court of Civil Appeals first, that said Court erroneously found other employees of the petitioner were guilty of proximate negligence; second, that said court erroneously found that the deceased did not assume the risk of said negligence and,

third, that the verdict was excessive. (R., 229-231, 232-235). The petitioner here has abandoned the first and third grounds and only specifies as error, in addition to the failure of the trial judge to use the word "compensation" in his charge, a broad and general announcement by the Tennessee Supreme Court of the principle of law that in a suit under the Federal Employers' Liability Act, the employee could not (in any such case) assume the risk of the negligence of the employer or his fellow servants (Petition, 23; Petitioner's brief, 12). Evidently realizing *now that* such specification of error did not permit such a point to be raised, petitioner, in its brief (p. 19) completes its argument on this point by *first* reciting the error specified, and then saying:

> "Second. Under the undisputed facts and under the statement thereof contained in the decision of the Supreme Court of Tennessee recovery cannot be had for Kennedy's death simply because some of his subordinates and associates might have prevented the accident if they had done more."

Where a case is considered on certiorari, just as upon appeals and writs of error, the whole record is not thrown open for review and this Court *only examines errors assigned by the petitioner.*

Hubbard v. *Tod,* 171 U. S., 474, 494;

Montana Min. Co. v. *St. Louis, etc., Co.* 186 U. S., 24, 31.

To the same effect is rule 21 of this Court with the exception that the Court may, at its option, notice a *plain* error not assigned or specified. This is not a *plain* error; indeed, it is no error at all and, further, it must be remembered that certiorari cases are not considered by this Court as a matter of right and the writ is only granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." See *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S., 393.

The petitioner, in its brief on the first specification of error (pages 13-19) cites no authorities and no facts *showing knowledge by the deceased of negligence of his co-employees* (or of the petitioner) and, hence, this specification of error must fail. Its discussion relates solely to another principle of law, as shown, and has nothing to do with the question of *assumption of risk.* However, as we are confident that a full examination of the record, *under the verdict of the jury,* shows no assumption of risk of any fellow employee's negligence, *without waiving our objection* to the Court's considering this point under the state of the record, *i. e.,* errors as specified and shown, we briefly mention the applicable law and refer to the record and the facts on the question of the *correct* doctrine of assumption of risk.

There was No Assumption of Risk in this Case Because No Knowledge by Kennedy of the Negligence of His Co-Employees.

While under the Employers' Liability Act, negligence of co-employees may be an assumed risk, yet

this is only where the negligence was, in fact, *known to the plaintiff or was so customary that he must be charged with knowledge and, also plaintiff must appreciate the danger.*

Michigan, etc., Railway Co. v. *Schoffer,* (C. C. A., 6th Circuit), 220 Fed., 809, 813;
C. & O. R. Co. v. *De Atley,* 241 U. S., 310, 315;
C., R. I. & P. Co. v. *Ward,* 251 U. S., 18, 21-22.

Petitioner cites no proof, and there is no proof, showing, or tending to show, that Kennedy had *any reason* to know or believe that the flagman and the fireman would not, on this trip, look out for No. 1 and warn him or angle-cock the train if need be, nor that they had *ever* failed to look out for No. 1.

The only testimony intimating any possible knowledge by the engineer that any member of the crew might, at any time, not have been on the lookout for No. 1 appears in the cross-examination of Eubanks, the conductor (who was in the employ of the petitioner at its shops and being the only accessible surviving member if the crew was called by the respondent as a witness) (R., 65). Eubanks' answers to petitioner's questions were evidently not satisfactory as the matter was not pursued, so that the record was there left in *imperfect* shape on this point and the testimony is *somewhat ambiguous and uncertain.* But a fair inference therefrom is that on one or more occasions, *previous* to this occasion, Eubanks had specifically requested Kennedy to look out for No. 1 for him 'that morning,' that there was no regular custom of this kind however and that as the

conductor did not make this specific request on other mornings, including the morning in question, Kennedy had the right to believe that Eubanks did not expect him on this morning to look out for him and, hence, he did *not assume the risk* of the conductor's negligence. This issue was *squarely* submitted to the jury upon special request of petitioner (R., 186) and the jury, by its verdict (R., 2), found against the petitioner.

Under both the Federal and State rule, *this settled the question of fact.*

Richmond & Danville R. R. Co. v. *Powers,* 149 U. S., 43, 45;

Rapid Transit Co. v. *Seigrist,* 96 Tenn., 119, 124-125.

Any intimation or statement that Kennedy knew, or had cause to know, that the conductor would not be on the lookout for No. 1 *that morning* and, hence, he assumed the risk of such omission of negligence is inadvertent, *plainly* contrary to the finding of the jury under proper instructions and, hence, *must be disregarded.*

Indeed, that the jury correctly found that Kennedy had no reason to believe that Eubanks or any other member of the crew would fail to look out for No. 1 that morning, and hence did not assume any risk of their not doing so, is seen from Eubanks' clarification, on re-direct examination, of his former uncertain and ambiguous testimony when he said in regard to the custom as to looking out for passage of trains, etc., when his train was crowded:

> "I think it is the custom for *us all* to look out when we are crowded that way, for any member of the crew." (R., 73).

The Court of Civil Appeals, in affirming on this issue, *appreciated the correct rule of law,* under the Liability Act, on the assumption of risk of negligence of fellow servants. (R., 208). If it is permissible to say so, the respondent *never has contended otherwise* and the Court of Civil Appeals quoted the law and the authorities there set forth from respondent's brief in that Court.

Under the facts, the Supreme Court of Tennessee was correct in stating that both under the law and the *evidence,* the engineer did not assume the risk. (R., 251).

In view of the above, it is immaterial whether or not language used by the Judge who delivered the opinion of the Supreme Court of Tennessee in another portion of the opinion properly bears the construction contended for by petitioner, *i.e.* that the doctrine of assumption of risk is abolished by the Employers' Liability Act, because such a situation is ruled by the case of *St. Louis & San Francisco Railroad Co.* v. *Brown,* 241 U. S., 223, 227-8, in which this Court *declined to reverse on writ of error* the Supreme Court of Oklahoma in an Employers' Liability case where that Court flatly announced that the doctrine of assumption of risk had been abolished. However, the question of fact had been submitted to the jury in a trial court under charge not here complained of, and this Court said:

> "At best, therefore the error asserted simply amounts to contending that *because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of reversing the judgment although no reversible error exists.*"

See also *Seaboard Air Line Railway* v. *Moore,* 228 U. S.. 433, 435, where the Circuit Court of Appeals for the Fifth Circuit was seemingly guilty of the same inadvertent statement.

The quotation from the Brown case squarely fits petitioner's first specification of error and, hence this Court will disregard same. The function of this Court is not to correct erroneous statements of law in an *opinion,* but to review errors committed in the *proceedings.*

II.

SECOND SPECIFICATION OF ERROR.

The second specification of error is that the Supreme Court of Tennessee erred in holding that it was harmless error for the trial court to omit the word "compensation" in charging the jury as to damages.

Failure of Trial Court to Use Word "Compensation" in Charge to Jury not Error.

The trial court, after reciting the proper facts to be considered by the jury in assessing the damages, instructed them "to make such pecuniary allowance therefor as in your opinion is warranted by the evi-

dence. In no event should your verdict exceed the amount sued for in the declaration." (R., 185, 195-6, 249).

The objection thereto, taken when motion for new trial was filed, was simply that the jury were nowhere limited to "compensation." (R., 196). So that if the jury had been instructed at the conclusion "to give such compensation therefor as, in your opinion, is warranted by the evidence " or "to allow compensation therefor in such amount as is warranted by the evidence," there would have been no objection and yet, what difference is there in the sense of these several statements and in the understanding that the jury would have thereof?

The Supreme Court of Tennessee (R., 250-251) did not state whether the Federal or State law should control in measuring this question but held that this charge did not prejudice the defendants, and "while not strictly correct, there was *no evidence* in the record which tended to show that the verdict was in excess of the pecuniary loss sustained by the beneficiaries" and that the jury were well warranted in awarding that amount.

As to whether or not, in such a situation, the Appellate Court should reverse was a question of practice. Clearly, under the State rule, the Supreme Court committed no error in not reversing.

Thompson-Shannon's Code, § 4902a-1;
Acts of 1911, chap. 32;
Compress Co. v. *Insurance Co.,* 129 Tenn., 586, 597.

This statute reads (in the relevant part) "No verdict or judgment shall be set aside or new trial granted by any of the appellate courts of this state, in any civil or criminal cause, on the grounds of error in the charge of the judge to the jury * * * unless, in the opinion of the appellate court to which application is made after an examination of the entire record in the cause. it shall *affirmatively appear* that the error complained of has affected the results of the trial."

Under the Federal practice, an exception to any portion of the charge must be specific and is of no avail unless taken before the jury retires (*Pacific Express Co.* v. *Malin,* 132 U. S., 531, 538) and the reason for this is, of course, that the trial judge may then and there consider the exception and have an opportunity to give new and different instructions if he should then deem it proper to do so. Under the Tennessee practice there is no exception taken until the motion for new trial is made, after the jury has brought in its verdict. Hence, it is quite fitting that the rule announced by the Act of 1911 should prevail for, if parties are permitted to wait until some time after the verdict to go over the record and then critically examine same for exceptions, without any opportunity for the trial judge to have set himself right before the jury at the trial, the complaining party should be forced to show that he was, in fact, prejudiced.

The *practice* in an action in a State court under

the Federal Employers' Liability Act is regulated by the law of the forum.

Chesapeake & Ohio Railway Co. v. *De Atley* 241 U. S., 310, 317.

This we believe fully answers the second specification of error, but to go further, may say if the question of proper measure of damages is inseparably connected with the right of action and must be settled by the Federal law. (*Chesapeake & Ohio Railway Co.* v. *Kelley,* 241 U. S., 485, 491), a reading of charges approved by the Federal and many other courts shows that the use of the word *"Compensation"* is not necessary, but the Court can use any appropriate language conveying the idea of making pecuniary allowance warranted by the evidence for the damages or injury *flowing* or *resulting* from the negligence of the defendant.

Chesapeake & Ohio Railway Co. v. *Carnahan,* 241 U. S., 241, 243;

Southern Pacific Co. v. *Cavin,* 144 Fed., 348, 75 C. C. A., 350;

Railway v. *Otto,* 52 Ill., 416;

Munro v. *Pacific Coast, Etc., Co.,* 84 Cal. 515.

In the Carnahan case the trial court, on the measuse of damages, instructed the jury as follows:

> "The Court instructs the jury that if they believe from a preponderance of the evidence that defendant is liable to plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his

> pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, *as to them may seem just and fair.*"

It is to be noted that this instruction apparently gave the jury more latitude, by its verbiage, than did the instruction complained of in the instant case. This court, in affirming, held that this instruction was not objectionable as leaving the amount of damages to conjecture without regard to the evidence, where the Court explicitly enjoined upon the jury that there must be a proximate and casual relation between the damages or injuries and the defendant's negligence.

In the instant case, the lower court repeated several times the language of the Act that the injuries or death must have *resulted,* in whole or in part, from negligence of the carrier; that said negligence, in whole or in part, must have been the cause of the injury and death of David Kennedy before the plaintiff could recover (R., 184, 185) and at the request of the defendants explicitly charged:

> "I charge you that an injury which is the natural and probable result of the act of negligence is actionable and (when?) such act is the proximate cause of the injury."
> R., 186.

The question of liability being determined, the damages or injuries to plaintiff arose solely from the death and the *elements* were properly stated and her damages were expressly limited to those *"warranted by the evidence"* and the charge was not erroneous,

particularly, in the absence of request for further instructions.

The Tennessee case of *Railroad* v. *Witherspoon,* 112 Tenn., 128, which reversed the lower court for failure to use the word "compensation" in the charge, has been considerably limited by the decision of the Court of Appeals in *Telephone Co.* v. *Carter,* 1 Tenn., C. C. A., 750, 771-7, (writ of certiorari denied by the Supreme Court of Tennessee) which sustained a charge where the word "compensation" was not used. The Supreme Court of Tennessee has, indeed, *squarely* passed from the position which petitioner says it took in the Witherspoon case, i. e., that the word *"compensation"* in a charge as to measure of damages is a *sine qua non,* because in the case of *Atkin* v. *Shenker,* 4 Tenn., C. C. A., 298 it denied writ of certiorari. In that case, the complaint was made that the trial judge did not use the word "compensation." He did give the elements of recovery (*as in the case at bar*) and then told the jury to assess the damages in such amount as "the plaintiff was justly entitled to recover." The Court of Civil Appeals stated that the term *"compensation"* 'is an expression used in the law, but need not be given to the jury *haec verba.*' The holding is succinctly set forth in the fifth head note as follows:

> "It is not error for the trial judge to omit from his instructions the word *compensation* if it is apparent that the jury understood that they were instructed to award a plaintiff such sum as the *proof showed he was entitled to.*"

The Supreme Court of Tennessee, by refusing is-

suance of writ of certiorari in the case of *International Corporation* v. *Wood,* 8 Tenn., C. C. A., 10, 28, has also heretofore adopted the rule that there should be no reversal for an erroneous instruction as to damages where it was apparent that no more than fair compensation was awarded and, it may be said, the Wood case was a personal injury case.

In the Tennessee cases cited on page 21 of Petitioner's brief, no one of them relates to the use of the word "compensation" in a charge except the Witherspoon case. The others were cases of *positive, affirmative error* in charges not relating to the measure of damages except, in the case of *Jones* v. *State,* 128 Tenn., 493, 498, a murder case, where the judge *omitted* to charge on second degree murder and our Supreme Court held that the effect of our statute was to require such charge in all murder cases.

In view of later action of the Supreme Court of Tennessee, as shown above, it is to be noted that the Supreme Court in the instant case (R., 250) did not hold that there was positive error but simply said, in regard to the conclusion of the portion of the charge relating to damages, that it was objectionable and in strictness incorrect.

While the idea or theory of compensation permeates the Federal Liability cases cited by petitioner, *yet NONE of them held that a lower court was in error for failing to use the word "compensation."*

But even if the Federal rule as to *practice,* which it does not, prevails and a strict rule requiring the use

of the exact word "compensation" governed, yet we must remember that the Federal rule of practice is that any error is not sufficient for reversal if the record discloses no injury resulted therefrom.

West v. *Camden,* 135 U. S., 507;
Carlisle Packing Co. v. *Sandanger,* 259 U. S., 255, 259.

And here the Tennessee Supreme Court found that not only "was the verdict not in excess of the pecuniary loss sustained, but also the evidence tended strongly to show that the beneficiaries sustained *at least* this pecuniary loss and the jury was well warranted in finding this amount." (R., 250.)

Petitioner says it *'asks no review of the facts'* (Petition, 7). The Supreme Court of Tennessee has found the jury was *well warranted* in finding this amount; in other words, that *no injury* resulted to petitioner and, hence, *under the very authorities cited by petitioner,* this Court will not reverse for the failure of the trial judge to use the word *"compensation,"* even if this omission were error and the Federal practice prevails. The Supreme Court was entirely correct in this statement as the *undisputed* evidence showed that the decedent was earning $3,000.00 a year, was an extraordinarily vigorous man for his age, had never been sick, his expectancy of life was quite great, his family consisting of a wife (stone deaf), two daughters and a son, received practically all he made and he was greatly interested in and gave the best care and advice to his family. (R., 81, 78, 106, 118, 180, 24, 25, 26.)

The Carlisle table (R., 180) shows average expectancy at this age to be 8.16 years and with Kennedy's extraordinary vigor he would have probably lived eleven or twelve years longer.

CONCLUSION.

This case is now being heard six years after Kennedy's death. If entitled to a recovery, Kennedy's administratrix should *now* receive same. She is entitled to the recovery given by the jury because, first, there was no error at any time warranting a reversal or dismissal and, second, there is certainly no error *here* claimed and specified that this Court will reverse for under the well settled principles of substantive law and practice heretofore announced by it.

Therefore, it is submitted that the case should not be reversed, but writ of certiorari should be dismissed.

Respectfullly submitted,

W. E. NORVELL, JR.

October 1924.

Counsel for Respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Henderson, a shipper of cattle, brought this suit in a state court of Arkansas against an interstate carrier then under federal control. The cause of action alleged was failure to furnish a car within a reasonable time after notice. The carrier defended on the ground that the shipper had not complied with a rule, approved by the Interstate Commerce Commission, and contained in its tariff, which provided that orders for cars must be placed with the local agent in writing. Written notice was not given. The plaintiff was permitted to testify that he had notified the station agent orally and that the latter had accepted his oral notice. The trial court refused to instruct the jury that the shipper could not recover without proving a notice in writing. Exceptions were duly taken. The plaintiff got the verdict; and the judgment entered thereon was affirmed by the highest court of the State. 157 Ark. 43. The carrier brought this writ of error; and, also, filed a petition for a writ of certiorari, consideration of which was postponed until the hearing on the writ of error. The former must be dismissed. Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. The writ of certiorari is now granted.

There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197; *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383, 388; *Davis* v. *Cornwell*, 264 U. S. 560, 562.

Writ of Error dismissed.
Writ of Certiorari granted.
Judgment reversed.

DAVIS, AGENT, *v.* HENDERSON.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 44. Submitted October 8, 1924.—Decided October 27, 1924.

1. A judgment of a state court rendered against an interstate carrier, when under federal control, through failure to give effect to a rule in its tariff, *held* reviewable by certiorari and not by writ of error. P. 93.
2. A tariff rule, approved by the Interstate Commerce Commission, providing that orders for cars given the carrier's local agent must be in writing, cannot be waived by the carrier through the agent's acceptance of oral notice from the shipper. *Id.*

157 Ark. 43, reversed.

ERROR and certiorari to a judgment of the Supreme Court of Arkansas affirming a judgment against a carrier in an action by a shipper for failure to furnish a car within a reasonable time after notice.

Mr. A. A. McLaughlin, Mr. Thomas B. Pryor and *Mr. Vincent M. Miles*, for plaintiff in error and petitioner.

No brief filed for defendant in error and respondent.

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